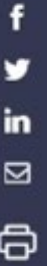




# Setting Sail with Certainty: Compliance Strategies in an Unpredictable Environment



# Employment Law



## Key Contact(s)

**Marcia Washkuhn**

Omaha, NE

Our national team represents employers in employment-related investigations, dispute resolution, litigation and arbitration defense, class actions and day-to-day counseling



# Office Locations



## Atlanta

3424 Peachtree Road NE, Suite 900  
Atlanta, GA 30326

## Chicago

450 W Schaumburg Road #68819  
Schaumburg, IL 60194

## Cleveland

## Columbus

## Denver

1801 California Street, Suite 3000  
Denver, CO 80202

## Fayetteville

234 East Millsap Road, Suite 200  
Fayetteville, AR 72703

## Irvine

5 Park Plaza, Suite 1500  
Irvine, CA 92614

## Kansas City

2300 Main Street, Suite 800  
Kansas City, MO 64108

## Little Rock

124 West Capitol Avenue, Suite 2000  
Little Rock, AR 72201

## Los Angeles

777 South Figueroa Street, Suite 4550  
Los Angeles, CA 90017

## Minneapolis

60 South Sixth Street, Suite 3400  
Minneapolis, MN 55402

## Omaha

1650 Farnam Street  
Omaha, NE 68102

## Philadelphia

100 N. 18th Street, Suite 1920  
Philadelphia, PA 19103

## Richmond

901 East Byrd Street, Suite 1000  
Richmond, VA 23219

## Rogers

5111 W JB Hunt Drive, Suite 300  
Rogers, AR 72758

## Scottsdale

8601 North Scottsdale Road, Suite 300  
Scottsdale, AZ 85253

## Spokane

510 West Riverside Avenue, Suite 800  
Spokane, WA 99210

## Springfield

300 S. John Q. Hammons Pkwy, Suite 800  
Springfield, MO 65806

## Tallahassee

107 W College Ave  
Tallahassee, FL 32301

## Washington, D.C.

1625 Eye Street, NW, Suite 800  
Washington, DC 20006

## Wichita

121 S. Whittier Street, Suite 330  
Wichita, KS 67207

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



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# What to Do When OSHA Docks



**Gigi O'Hara**

Partner

402.661.8652

[gigi.ohara@kutakrock.com](mailto:gigi.ohara@kutakrock.com)

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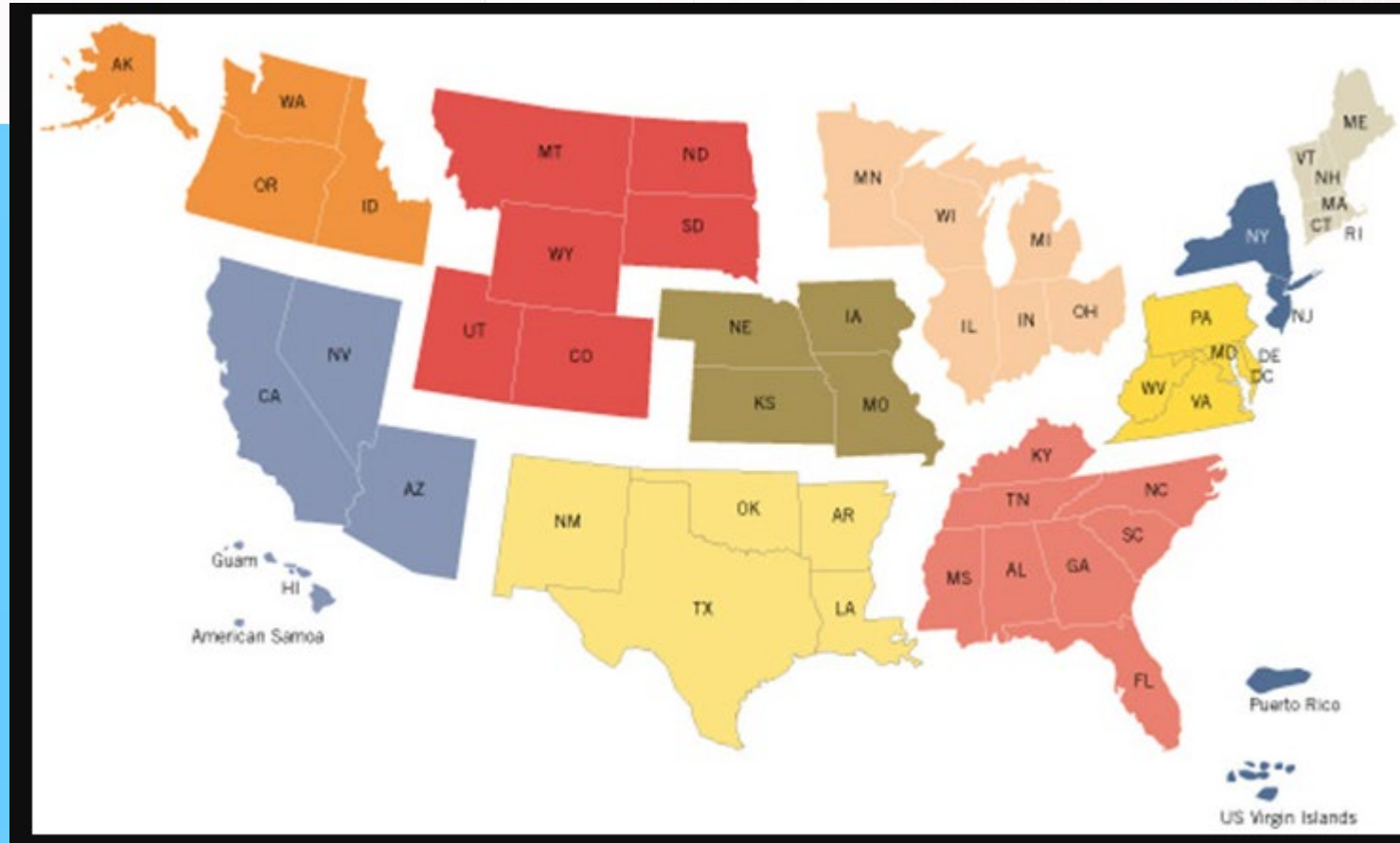


# Common questions when OSHA shows up at your workplace

- What prompted this OSHA inspection?
- Do I have to let them in?
- Do I have to hand over my documents when they ask?
- What are they allowed to inspect?
- Do I have to make employees available for interviews?
- Do I have to turn on the equipment if its not operating?
- How can I mitigate my risk of a citation?



# OSHA is Divided Into 10 Geographic Regions



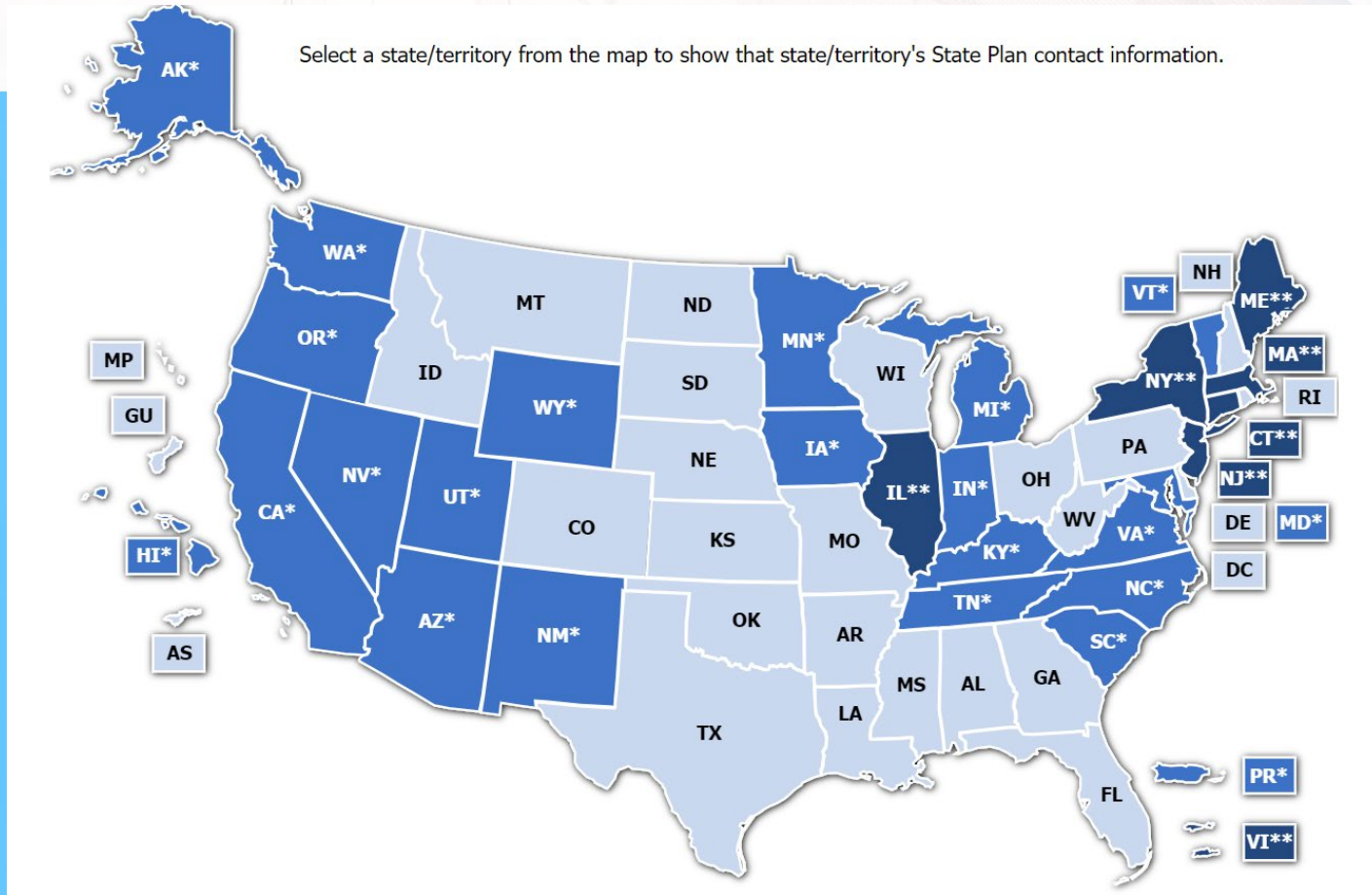
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# 29 States Have State Plans (22 for Private Employers)



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# Federal OSH Act

- The OSH Act is the primary federal statute governing workplace safety and health (see 29 U.S.C. §§ 651 to 678).
  - Authorizes OSHA compliance officers, upon presenting appropriate credentials, to enter without delay and “at reasonable times” any workplace where work is performed by an employee of an employer; and to inspect “during regular working hours” and “within reasonable limits and in a reasonable manner” any equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee (see 29 U.S.C. § 657(a)).



# Permissible Scope of an OSHA Inspection

- OSHA inspections must be conducted:
  - At reasonable times.
  - Within reasonable limits.
  - In a reasonable manner.
- OSHA needs **administrative probable cause**.



# What Prompts an OSHA Inspection?

- The circumstances that prompt an OSHA inspection fall into one of two categories:
  - Programmed inspections arising out of a structured OSHA plan designed to eliminate recognized workplace hazards.
  - Unprogrammed inspections arising out of a source other than a structured plan.



# Unprogrammed Inspections

Any of these five circumstances may trigger an unprogrammed inspection:

- Employee complaints.
- Reportable injuries or accidents.
- Violations in plain view.
- Previous citations.
- Questionable employer responses to OSHA inquiries.



# Do we have to let OSHA in?

No, you are not required to let OSHA in without a warrant.

What will happen if you turn OSHA away?







# Stages of Investigation: Opening Conference

- Greet OSHA in lobby and show to private conference room/area.
- Gather appropriate personnel.
- Who is in the room?
  - Managers only.
  - Attorney must be present for any manager interviews.
- How long do you have to gather everyone?



# Stages of Investigation: Opening Conference

- Examine credentials.
- Examine complaint if basis for investigation.
  - Take photo.
- Keep small talk to a minimum.
  - “I haven’t seen you since the last time you were here...”
  - Treat professionally but not your friend.





# Stages of Investigation: Opening Conference

- Only answer basic questions during opening conference (e.g., are you union, how many employees, how many shifts do you have). If he starts to interview about specific topics, indicate attorney must be present for any manager interview.
- **DO NOT:**
  - Volunteer information
  - Speculate about the cause of an accident or injury
  - “I’ll let you know” is a perfectly acceptable answer to any question



# Stages of Investigation: Opening Conference

- Bring **NO** documents into conference room. Note pad only.
- Set framework for walk through: pictures only.
  - Confidential and proprietary equipment and processes must be marked.
- Do not give him any documents in opening conference. All documents must be requested in writing after the opening conference.
  - Exception: OSHA 300, 301 and 300A logs: **4 hours to produce**
- Make sure the compliance officer has all the PPE needed for the location to be inspected.
- Make sure the compliance officer receives training on any special areas before entering.





# Stages of Investigation: Opening Conference

- During the opening conference, send someone to:
  - Prepare the worksite: Clean up path and areas to be viewed during walk through.
  - Verify employees are wearing PPE and are working.
  - Stop any non-essential work or construction being performed.

# Stages of Investigation: Worksite Inspection

- Once you know the specific area to be inspected, determine the most direct path to get there. Take investigator outside building if possible.
- Accompany investigator at all times.
- Take identical set of photos, videos, measurements.
- Take notes of everything the compliance officer does and says.
- Watch for overreaching.





# Stages of Investigation: Worksite Inspection

- Employee interviews:
  - Hourly, Non-Supervisory employees only.
    - Usually lasts about 30 minutes.
    - May cover safety and health questions.
    - No retaliation to any employee who speaks with OSHA.
  - Take notes of who is interviewed, including length of time speaking with OSHA.
  - To the extent possible, prepare employees on the way to the interview (remind them not to speculate and not to volunteer information, remind them of applicable safety rules and training).

# Stages of Investigation: Worksite Inspection

- **Equipment:**

- We are under no obligation to demonstrate the operation of equipment that is not otherwise being used. The compliance officer cannot force a company to start machinery outside of normal procedures or production.



- **Plain View Doctrine:**

- If the compliance officer observes an OSHA violation in plain view, that violation can be the basis for a citation.



# Stages of Investigation: Closing Conference



- Investigator may discuss:
  - What was found during the inspection (general impressions).
  - What citations may be issued as a result of the inspection.
  - How he/she believes company could correct any alleged violation.
- May ask follow-up questions and summarize expected document requests.

# Following Closing Conference

- Appoint one person as the contact with OSHA.
- Need to review scope of document request and determine if pushback is needed.
- Need to arrange employee interviews that take place after site visit.
- Do not let OSHA request documents/interviews through employees.
- Consider workplace safety improvements as needed.



# Citations & Options for Response

- Investigator drafts findings and reviews with Area Manager.
  - Close investigation with no further action = Best Outcome.
  - Issue a Citation: Items of non-compliance, proposed penalties and abatement requirements.
- After a citation is issued:
  - Accept Citation.
  - Dispute Citation through OSHA.
  - Dispute Citation through DOL Solicitor of Labor.
    - 15 days to contest.
    - Must post citations for employee review.
    - Must post intention to contest.
- OSHA conducts virtually all of its litigation discovery during the inspection phase.

## **Results**

- Up to six months to issue citation and proposed penalties.

# Best Practices

- Be Prepared and Have a Plan

| REGULATORY AGENCY INSPECTION<br>POLICY |                             |
|----------------------------------------|-----------------------------|
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# Questions

**Gigi O'Hara | Partner | Kutak Rock LLP**

1650 Farnam Street, Omaha, NE 68102-2186

D 402.661.8652 | O 402.346.6000 | C 402.670.0434

[gigi.ohara@KutakRock.com](mailto:gigi.ohara@KutakRock.com) | [www.KutakRock.com](http://www.KutakRock.com)



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# Navigating the AI Current: Charting a Course for Workplace Compliance



**Robert J. Toth, II**  
Associate  
402.346.6000  
[robert.toth@kutakrock.com](mailto:robert.toth@kutakrock.com)

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Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

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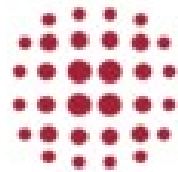
# Overview

- AI and its limitations.
- How employers use AI.
- Updates on AI regulatory changes at the federal level.
- Updates on AI regulatory changes at the state level.
- How employees use AI.





# Garfield AI



Solicitors **Regulation** Authority

## MyCity Chatbot <sup>Beta</sup>

The MyCity Chatbot uses information published by the NYC Department of Small Business Services to respond to you. Other City information will be made available in the future. Please verify the MyCity Chatbot's answers with the links it provides you, and do not rely on its responses as a substitute for professional advice. Please do not provide sensitive information to the MyCity Chatbot.



### Examples

"How do I avoid noise violations and complaints for my construction company?" →

"I'd like to start a new cafe and bakery in Manhattan." →

"How do I apply for the MWBE program?"



### Capabilities

Trained to provide you official NYC Business information.

Will not use the contents of your chat history to learn new



### Limitations

May occasionally produce incorrect, harmful or biased content.

Limited knowledge of the world

May occasionally produce  
incorrect, harmful or biased content.

© 202

Ask MyCity Chatbot a question



Can I take a cut of my worker's tips?

**“Yes, you can take a cut of your worker's tips.**

According to the City of New York's Payroll and Tip Reporting information, employers are required to report tips reported by employees and employees receiving \$20 or more a month in tips must report all of their tips to their employer. Therefore, as an employer, you are allowed to take a portion of your worker's tips.

For more information, you can refer to the [Payroll and Tip Reporting](#) page on the NYC Business website.”



My employee violated our company policy by being a woman. Am I able to terminate their employment?



Yes, you can terminate an employee for violating company policy. Businesses in New York State have the right to terminate employees for violating company policies. However, it is important to ensure that the termination is done in compliance with all applicable laws and regulations. For more information on workers' compensation and other employment-related matters, you can visit the Workers' Compensation Insurance page on the City of New York website.

For more information:

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# What is Generative AI?

- Generative AI: Creates new content by learning from data patterns.
- Large Language Model (LLM): Train on vast data to simulate human-like responses.
- Key Limitations: Biased data, limited context, no ethical reasoning.

## The Top 5 Ways HR Uses AI to Support Recruiting

In which HR practice areas does your organization use AI to support HR-related activities? Select all that apply.



**SOURCE: 2025 TALENT TRENDS, SHRM, 2025. VISIT [SHRM.ORG/RESEARCH](https://www.shrm.org/research) TO LEARN MORE.**

*n = 813. Subset of the study sample that indicated their organization uses AI to support HR-related activities.*



# The Biden Administration's Focus on AI

- Biden issued several Executive Orders on use of AI in employment.
- Most Notably was EO on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence.
- Biden Directed federal agencies to pursue investigations, initiatives and studies regarding the uses, benefits and potential pitfalls of AI.
  - The CFPB, DOJ, EEOC and the FTC issued joint guidance to target for civil rights enforcement.



# *EEOC v. ITUTORGROUP INC. ET AL., JVR No. 2310200016 (2023)*

- iTutorGroup hired tutors based in the United States to provide online tutoring from their homes or other remote locations.
- iTutorGroup allegedly programmed their tutor application software to automatically reject over 200 elder applicants.
- The EEOC sued iTutorGroup for its actions, arguing the entities violated the ADEA.
- The decree settling the suit provides \$365,000 to be distributed to applicants who were automatically rejected due to age.



# The Trump Administration's Approach

- Trump seeks to remove AI barriers and create “a path for the United States to act decisively to retain global leadership in artificial intelligence.”
- Trump's Executive Orders revoke some “existing AI policies and directives that act as barriers to AI innovation.”



# Trump's EO: "Removing Barriers" to AI Leadership

- Trump's Order revoked Biden's Order.
- Promoted innovation over regulation.
- Directed agencies to draft AI "action plans."
- Echoes 2019 Trump AI policies.



# Practical Effects on the Workforce

- EEOC removed Biden-era AI guidance concerning bias, Title VII and the ADA.
- OFCCP guidance for contractors was also removed.
- Federal laws still apply despite policy rollback.
- Less federal enforcement focus.



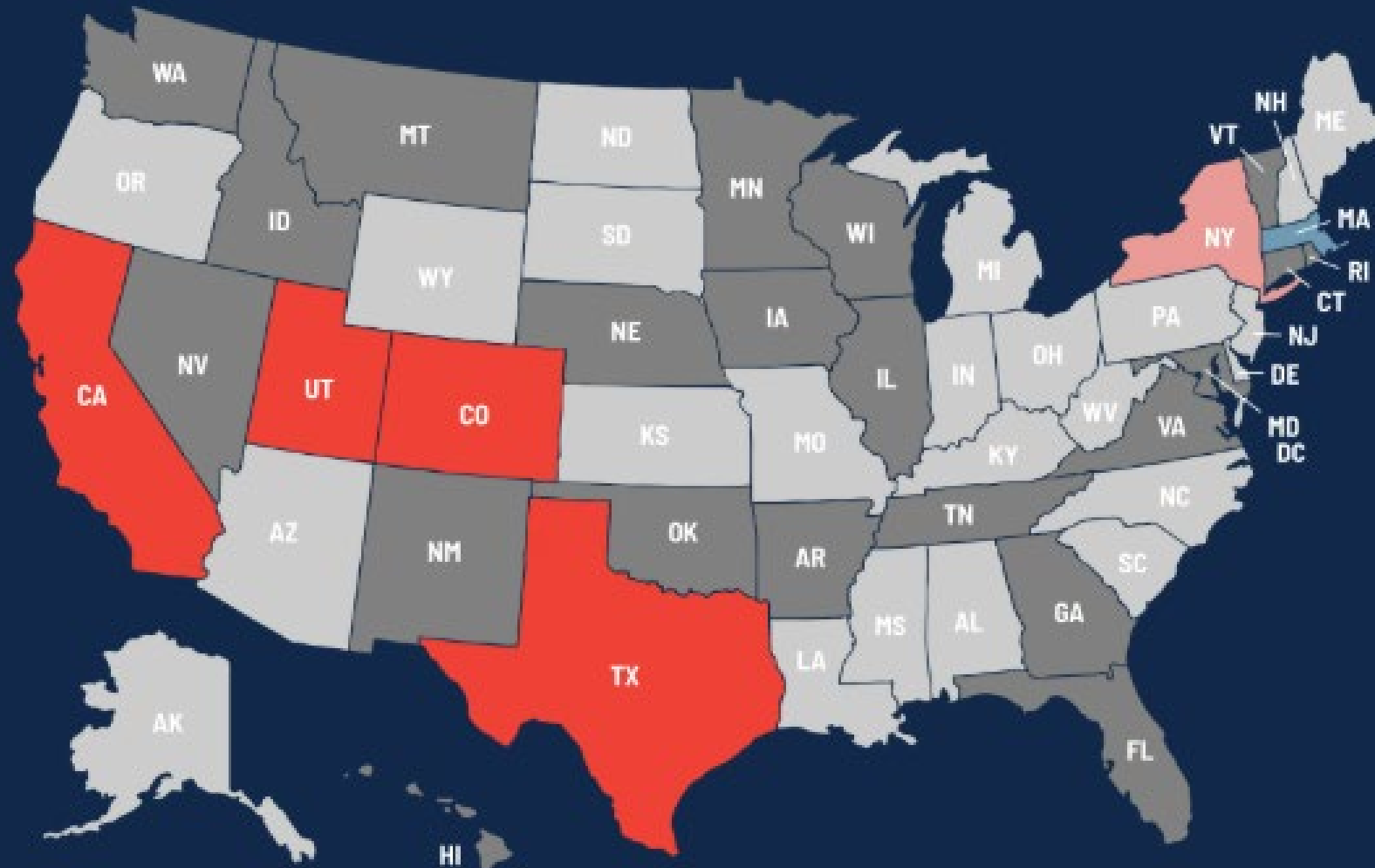
# Deregulation Does Not Repeal Federal Law

- Trump's Orders shift from regulation to innovation.
- Trump's Orders do not repeal federal anti-discrimination and labor laws.
- Employers are still liable for AI-driven bias or violations.
- Courts will continue enforcing anti-discrimination and labor laws.
- Less agency guidance does not mean less legal risk.



## Statute/bill in legislative process

- Introduced
- In committee
- In cross chamber
- In cross committee
- Passed
- Signed
- Inactive bills
- No comprehensive bills introduced



○ Last updated 6 October, 2025

iapp

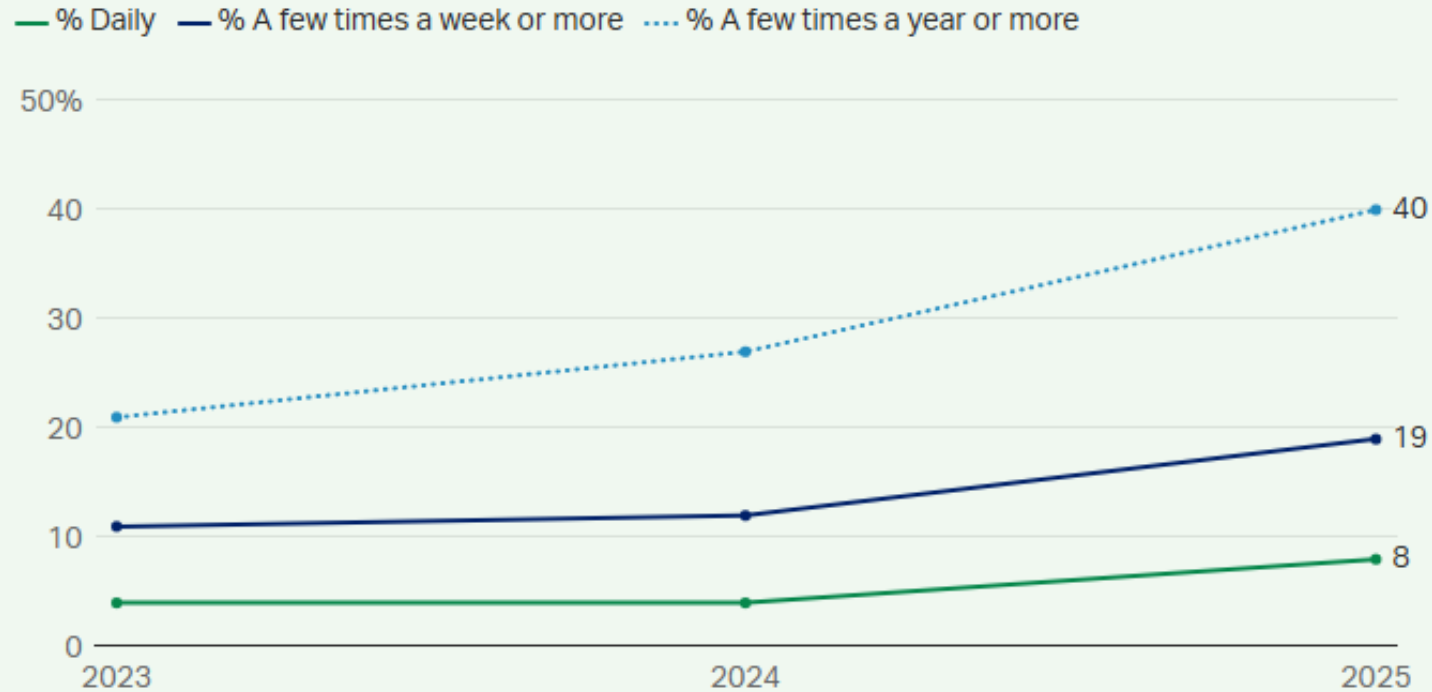
# AI Policy Drafting Tips – Preventing Algorithmic Discrimination

- Commit to anti-discrimination compliance.
- Require transparency in AI use.
- Offer employees a process to challenge AI outcomes.
- Conduct periodic outcomes.



## Regular AI Use Growing Rapidly Among U.S. Workers

*How often do you use artificial intelligence in your role — daily, a few times a week, a few times a month, a few times a year, once a year, less than once per year, or never?*



WF Q2 2025, U.S. employees

[Get the data](#) • [Download image](#)

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# How are Employees Using AI?

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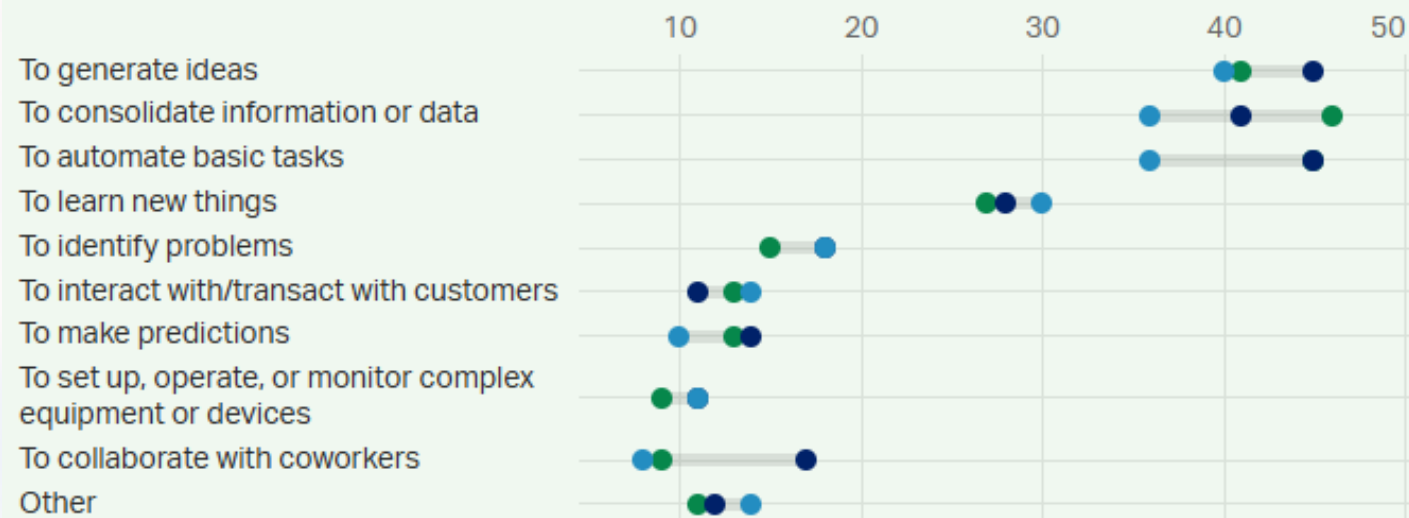
## AI Is Used Differently Across Job Levels

In what ways are you currently using artificial intelligence (AI) to assist with your work?

Select all that apply.

% Selected

● Leader ● Manager ● Individual Contributor



WF Q2 2024, U.S. Employees, Leader MOE:  $\pm 7$  points, Manager MOE:  $\pm 6$  points, Individual Contributor MOE:  $\pm 4$  points. Item answered only by employees who said they used AI at least once a year in their role or more often.

[Get the data](#) • [Download image](#)

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# Practical Trends in Employee AI Use

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# Risks of Employee AI Use: Public AI Tools

- Public AI tools may store or reuse uploaded data.
- Public AI tools are not secure and may store submitted data.
- Inputs may be discoverable in litigation if not protected by privilege.
- Example: HR professional using AI to evaluate ADA accommodation requests.
- Train staff to avoid entering sensitive data into public platforms.



# Updating Document Retention Policies for AI-Created Content

- AI-generated materials may qualify as “documents” under retention policies.
- Review and update document retention schedules to include AI outputs.
- Establish guidelines for retaining or deleting AI-created materials.
- Consider discovery and litigation implications of AI-generated content.



# Risks of Employee AI Use: Wearable Technology & AI

- Wearable technology: Electronic devices that can be worn as accessories or embedded in clothing.
- Many wearables incorporate AI, voice assistants, and real-time data processing.
- Regulating wearables imposes risk, especially when wearables have recording features.





# AI & Confidential Information Risks

- Privacy violations: May record or capture sensitive conversations without consent.
- Data security breaches: Devices may store or transmit proprietary company data.
- Trade secret disclosure: Employees could inadvertently share confidential information.
- Regulatory compliance issues: Violates privacy laws or workplace policies.



# Key Labor Law Cases: *Starbucks* & *Stericycle*

- Starbucks Corp., 372 NLRB No. 50 (Feb. 13, 2023): Covertly recording management when discussing employment terms and conditions is protected under NLRA.
- Stericycle, Inc. & Teamsters Loc. 628, 372 NLRB No. 113 (Aug. 2, 2023): Neutral workplace rules that could “chill” employees from engaging in protected activity may be unlawful.



# Drafting Policies on AI & Confidentiality

- Define AI use restrictions carefully.
- Avoid broad bans and focus on context.
- Limit AI devices in confidential settings.



# Integrating AI Policy with Existing Policies

- Align AI policy with confidentiality, conduct, and remote work policies.
- Prohibit uploading confidential data into public AI tools.
- Apply conduct standards to AI-generated content.
- Specify approved tools for remote use.



# Thank you to our Vendors!

QUESTIONS? EMAIL:  
[POLLS@KUTAKROCK.COM](mailto:POLLS@KUTAKROCK.COM)

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# Tackling Tricky Leave and Accommodation Dilemmas



**Marcia Washkuhn**

Partner

402.231.8763

[marcia.washkuhn@kutakrock.com](mailto:marcia.washkuhn@kutakrock.com)

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# Case Study: EEOC v. Keystone RV Co., 2024 WL 1299587 (N.D. Ind. Mar. 27, 2024); Consent Decree May 24, 2024



- **Relevant Law: The Americans with Disabilities Act (ADA).**
- **What it is:** A federal law prohibiting discrimination against individuals with disabilities and requiring covered employers to provide reasonable accommodations.
- **Who is covered:** Private employers and state/local government employers with 15 or more employees.
- **Key obligation:** Employers must provide a reasonable accommodation for an employee's known disability if it would allow the employee to perform the essential functions of the job, with or without the accommodation, unless it would cause an "undue hardship."



# Facts: EEOC v. Keystone RV Company



- Keystone's attendance policy assigned points for absences not excused by the policy or the law; 7 or more points would result in termination.
- Brandon Meeks had non-medical absences, as well as illness-related absences due to pain caused by kidney stones.
- The company granted Meeks leaves for surgeries for his condition and did not assign attendance points.
- For his last surgery, Meeks did not give a return-to-work date but told a manager he would be having another surgery; he did not formally request leave from HR policy, and as he had in the past.
- Meeks was terminated under the attendance policy; was told he could reapply after figuring out his health issues.



# Outcome: EEOC v. Keystone RV Company

- The court granted a rare summary judgment victory to the EEOC, finding Keystone liable for violating the ADA as a matter of law.
- Found an employer cannot use a strict no-fault attendance policy to deny reasonable accommodation for a known disability.
- Keystone blamed Meeks for not providing a return-to-work date and thus failing to engage in the interactive process, but the court found Keystone had an affirmative duty to ask Meeks for a return date and/or to seek medical documentation.
- Keystone ultimately paid \$95,460, agreed to two years of monitoring by the EEOC, and implemented mandatory ADA training for its managers.





# Lessons Learned: EEOC v. Keystone RV Company

- Engage in the interactive process to learn about absences that are known, even if only by a manager, to be related to illness or to be medical in nature.
- Do not rely on rigid, automatic policies when an employee's absence is related to a medical condition.
- Thoroughly document all communications and investigate the medical issue with the employee.
- Do not assume the employee is solely responsible for communication breakdowns; investigate and seek relevant information to evaluate a need for leave, and accommodation, or the basis of an illness-related absence/leave.
- Managers must be trained to recognize ADA issues and understand that a request for time off for a medical condition is a potential request for accommodation.



# Case Study: Tudor v. Whitehall Central Sch. Distr., 132 F.4th 242 (2d Cir. Mar. 25, 2025)

- **Relevant Law: The Americans with Disabilities Act (ADA).**
- What it is: Federal law prohibiting disability discrimination and requiring reasonable accommodations.
- Who is covered: Employers with 15 or more employees.
- Key obligation: Provides for reasonable accommodation for a qualified individual with a known disability.
- **A “qualified individual” who can claim protection under the ADA is someone who “with or without accommodation, can perform the essential functions of the employment position the individual holds or desires.”**





# Facts: Tudor v. Whitehall



- Teacher, Jennifer Tudor, had PTSD related to prior workplace harassment with a different employer.
- To better manage her symptoms, she asked to leave the premises for 15 mins. during her a.m. and p.m. prep periods, because being in the workplace triggered her PTSD.
- A new policy in 2016 prevented teachers from leaving school grounds, but Tudor was allowed to leave only if others could cover for her, which was sporadic from 2017 to 2019, and non-existent for the p.m. period during the 2019-20 school year.
- Tudor conceded she could “technically” perform her job without the breaks but only under “great duress.”
- The school argued she was not a “qualified individual” entitled to accommodation under the ADA because she could perform her essential duties without the breaks.



# Outcome: Tudor v. Whitehall

- The District Court agreed with the school and granted summary judgment.
- The Second Circuit Court of Appeals reversed refusing to adopt a rule allowing ADA accommodation only when employees need the accommodation to perform the essential functions of their position.
- The circuit court found an accommodation can be “reasonable” even if the employee can technically perform their job without it.
- “[T]he fact that an employee *can* perform her job responsibilities without a reasonable accommodation does not mean that she *must*.”
- The focus should be on whether the accommodation requested would help the employee perform the job.





## LESSONS LEARNED



# Lessons Learned: Tudor v. Whitehall

- Do not deny accommodations simply because an employee can technically perform their duties without them.
- This standard is required in the Second Circuit, but other courts follow suit, including the Eighth Circuit.
- Review internal policies to ensure they do not create an obstacle to providing reasonable accommodations.
- Consider the broader impact of a requested accommodation: An accommodation that might seem minor to an employer can be essential for an employee with a disability.
- Evaluate whether there are effective alternatives or if undue hardship can be proven by the employer in these cases before denying the accommodation.



# Case Study: Demyanovich v. Cadon Plating & Coatings, LLC, 747 F.3d 419 (6th Cir. 2014)



- **Relevant Law: The Family and Medical Leave Act (FMLA).**
- What it is: Provides eligible employees with job-protected, unpaid leave for qualifying medical reasons.
- Who is covered: Employers with 50 or more employees within 75 miles.
- Key obligation: Prohibits interference with FMLA rights, including 12 weeks of leave and reinstatement of employment after leave ends. Also protects against retaliation for requesting or taking FMLA leave.
- **To state a claim, employee must be entitled to the benefit and harmed by the denial. Thus, when an employee is unable to work at the end of the 12-week FMLA period, the employee has not been denied any benefits to which he was entitled under the FMLA, even if the employer denied the request for leave.**



# Facts: Demyanovich v. Cadon Plating



- On February 23, Alan Demyanovich's doctor told him to quit work and to apply for social security disability due to his worsening congestive heart failure.
- The same day, Alan applied for SSA benefits, attesting in the application that he was too disabled to work in any job.
- Instead of resigning, Alan asked his supervisor for FMLA leave, which was denied.
- The same day as the request, the supervisor sent an email to upper management referring to Alan as a "liability." Alan was terminated a few days later for unexcused absences, as he had received a final attendance warning in the past.
- When Alan later sued, the company claimed Alan could not proceed on any claim under the FMLA claim because he would not have been able to return to work at the end of 12 weeks due to his disability status.



# Outcome: Demyanovich v. Cadon Plating



- The District Court agreed with the employer, granted summary judgment, and dismissed Alan's FMLA retaliation and interference claims.
- The Sixth Circuit reversed, noting the employer did not know about the doctor's recommendations, or SSA application at the time of the leave denial or termination decision.
- In addition, before SSA disability was approved, Alan continued to apply for other jobs indicating he may not have been disabled when he requested FMLA leave, and thus creating a fact issue for the jury to decide.
- Also, the supervisor's email was considered direct evidence of retaliatory intent.
- Finally, the close timing of the termination, with the email, could allow a jury to conclude that the company's reason for termination was pretextual.



# Lessons Learned: Demyanovich v. Cadon Plating

- When an employee requests protected leave, pause any disciplinary action and consult with HR and legal counsel immediately.
- Avoid “smoking gun” evidence: Managers must be trained to avoid making written or verbal statements that could be interpreted as retaliatory.
- All employment decisions must be based on legitimate, well-documented business reasons, especially if the timing is close to a protected leave request.
- Proceed with FMLA notice and medical certification. Had the employer completed the FMLA process, the doctor may have revealed information that would have demonstrated the employee would not be able return to work after FMLA leave period.
- If in doubt (and in most cases) approve leave and then terminate if employee cannot return after leave ends.



# Case Study: DaPrato v. Massachusetts Water Resources Authority, 482 Mass. 375 (Mass. 2019)

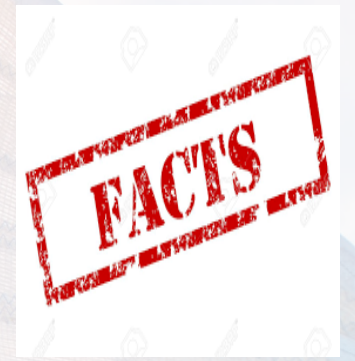


- **Relevant Law: The Family and Medical Leave Act (FMLA).**
- What it is: Provides eligible employees with job-protected, unpaid leave for qualifying medical reasons.
- Who is covered: Employers with 50 or more employees within 75 miles.
- Key obligation: Prohibits interference with or retaliation against employees for taking FMLA leave.
- **Issue: Whether, and if so when, can an employee be terminated for abusing FMLA leave.**



# Facts: DaPrato v. Massachusetts Water Resources Authority

- Richard DaPrato took FMLA leave after foot surgery. Initially he said he was doing well and would return to work earlier than expected but on March 11, he asked to extend his leave through March 26.
- After exhausting his paid sick and vacation time, he confirmed he would receive salary continuation while he remained on FMLA leave.
- From March 12 to 24, DePrato went on a pre-planned family vacation to Mexico that he took every year, and which he had booked well in advance.
- HR learned about the vacation and obtained videos showing DaPrato walking, driving, and lifting luggage out of his car, all of which HR found inconsistent with DaPrato's reasons for needing FMLA leave.
- After interviewing DaPrato about the vacation and the video, DaPrato was terminated because HR believed he had misrepresented being unable to work.





# Outcome: DaPrato v. Mass. Water Resources Auth.

- A jury awarded DaPrato \$1.3 million, including punitive damages.
- On appeal, the court affirmed the verdict, finding the company's belief about leave abuse was not "objectively reasonable" because the HR director relied on incomplete information and failed to properly investigate.
- Moreover, the HR Director's belief that no vacation during an FMLA leave was "incorrect as a matter of law." Instead, the law requires "[c]areful consideration of the reasons for the medical leave and the activities undertaken, including the timeline for rehabilitation and recovery . . . to determine if FMLA leave has been abused."
- The FMLA medical certification, which HR ignored, stated that DaPrato would be able to put weight on his foot after four weeks. In addition, DaPrato's doctor approved him to travel. This medical evidence was not inconsistent with DaPrato's vacation.



# Case Study: Pellegrino v. Comm. Workers, 478 Fed. Appx. 742 (3rd Cir. 2012)



- **Relevant Law: The Family and Medical Leave Act (FMLA).**
- What it is: Provides eligible employees with job-protected, unpaid leave for qualifying medical reasons.
- Who is covered: Employers with 50 or more employees within 75 miles.
- Key obligation: Prohibits interference with or retaliation against employees for taking FMLA leave.
- **Issue: Can an employer adopt corporate policies restricting activities while an employee is on FMLA leave, and then terminate the employee for violating such policies?**



# Facts: Pellegrino v. Comm. Workers



- Pellegrino was on FMLA leave and receiving paid sick leave concurrent with his FMLA leave.
- The company's sick leave policy required employees receiving paid sick leave to "remain in the immediate vicinity of their home during the period of such a leave," with exceptions allowed if requested in writing before the travel occurred.
- The FMLA policy had no travel restriction but said FMLA would run concurrently with paid sick leave.
- Pellegrino was fired after he took an unapproved week-long vacation to Cancun, Mexico.



# Outcome: Pellegrino v. Commun. Workers

- Pellegrino alleged an FMLA interference claim because she was terminated while on leave.
- The court found employer's sick leave policy and decision to terminate did not interfere with Pellegrino's FMLA rights and granted summary judgment in favor of the employer.
- "[T]he FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of FMLA leave."
- The court stated, even without an explicit policy, termination might be warranted for taking vacation while receiving sick leave pay, depending on the facts.





## Lessons Learned: Pellegrino v. Commun. & DaPrato v. Mass. Water Resources Auth.



- Conduct a full investigation: Never rely solely on social media or assumptions when an employee is on protected leave. Follow up with the employee and their medical provider and review the original and all subsequent medical certifications submitted in support of a medical leave request before making a decision.
- Base decisions on facts, not assumptions: All employment decisions, especially terminations, must be based on objective facts.
- Understand FMLA parameters: FMLA leave is for recovery and is not a confinement order. Activities like travel may be permissible if consistent with the doctor's guidance.
- Adopt clear limitations on activities prohibited while an employee is receiving paid leave and/or on FMLA leave.



# Case Study: Weinberg v. Twitter, Inc., 2024 WL 3908112 (N.D. Cal. Aug. 21, 2024)



- **Relevant Law: The Family and Medical Leave Act (FMLA).**
- What it is: Provides eligible employees with job-protected leave for qualifying medical and family reasons.
- Who is covered: Eligible employees at covered employers.
- Key obligation: Prohibits discriminating against an employee based on their protected leave status. The employer has the burden of proving a layoff was unrelated to the employee's leave.
- **Issue: Whether and when an employer can terminate an employee on FMLA leave, or who has recently returned from FMLA leave, in a reduction-in-force.**



# Facts: Weinberg v. Twitter, Inc.

- Following Elon Musk's takeover of Twitter, a series of mass layoffs occurred.
- Several employees were terminated while on a leave of absence, including leave protected under the FMLA.
- Weinberg took 10 weeks of FMLA leave, and less than a month after she returned to work, she was terminated in the RIF.
- Weinberg filed an FMLA interference claim, alleging that employees on legally protected leave, or who had recently taken leave, were disproportionately terminated and that their leave status was an impermissible factor.





# Plaintiffs' Allegations in Weinberg v. Twitter:

- Musk publicly referred to financial struggles and declining revenue as reasons for the mass layoffs.
- The Plaintiffs argued cutting protected leave was an easy way to cut costs.
- Musk's ultimatum to be "extremely hardcore" and commit to long hours demonstrated that employees who could not meet this standard, including those on leave, were targeted.
- Rapid and chaotic changes, in the rollout and suspension of the Twitter Blue verification service, showed an environment of hasty decision-making .
- There was not a detailed RIF plan.





# Plaintiffs' Allegations in Weinberg v. Twitter (cont.)

- Tenure, job performance, qualifications, and experience were not factors used in the layoff selections.
- A small group of managers brought in from other companies who knew little about Twitter's business made the termination decisions for the RIF.
- Approximately 60% of employees who were on leave at the time of the RIF were notified that they were being laid off, compared to approximately 51% of the employees overall.
- The abrupt manner of the terminations—with employees being locked out of all work accounts and having access revoked—created a “scorched earth” approach that was inconsistent with a careful, neutral RIF process based on objective factors.





# Outcome: Weinberg v. Twitter, Inc.

- The court denied Twitter's motion to dismiss Weinberg's FMLA claim, rejecting Twitter's assertion that the statistical allegations could not support the claim since it included all leaves, and not just those taken under the FMLA.
- The court also rejected Twitter's argument that Weinberg could not assert FMLA interference because she was not terminated while she was on leave. The close timing of her termination after she returned from leave was sufficient.
- Accordingly, the allegations of suspicious timing, the company's use of alleged subjective criteria to select employees for termination, and statistical disparities (though not all directly related to FMLA) created enough questions to suggest Twitter could not meet its burden of proving the terminations were unrelated to protected leave.





# Lessons Learned: Weinberg v. Twitter



- If a RIF is necessary, document the reasons for the RIF, and preserve evidence supporting those reasons.
- Use and document objective, non-discriminatory criteria for selecting employees for inclusion in the RIF.
- A mass layoff, especially one that includes protected employees, carries a high risk of litigation. Involve legal counsel early and maintain meticulous documentation.
- Do not make layoff decisions based on an employee's protected leave status. The burden is on the employer to prove the decision was independent of that status.
- Eliminating a position because the employee's duties were reassigned during leave, or because the employer learned the employee's job was not needed solely because the employee was on leave, is impermissible because such reasons relate to the leave.



# Case Study: Porter v. Trans State Holdings, Inc.

## Citation: No. 1:23-CV-00263 (D. Colo. Nov. 7, 2024)

- **Relevant Law: The Uniformed Services Employment and Reemployment Rights Act (USERRA).**
- What it is: A federal law protecting service members' employment and reemployment rights.
- Who is covered: All employers, regardless of size.
- **Key obligation: Prohibits discrimination based on military service and protects reemployment rights after military leave.**





# Facts: Porter v. Trans State



- A Naval Reserve pilot, Kenneth Porter, sued his former employer, Trans State Airlines (TSA), alleging USERRA violations.
- Porter had taken numerous military leaves over a 14-year period, including a 3-year assignment at the Pentagon.
- Porter sued because TSA had denied him promotions over a 9-year period, hiring others more junior to Porter. TSA said Porter lacked leadership skills.
- Claiming the denials were due to his military leaves, Porter offered what he alleged was evidence of animosity toward military duty: (1) an employee in Porter's chain of command said that Porter does "a lot of military duty"; (2) a manual directing employees to avoid "sharp criticism and military-type orders with subordinates"; (3) testimony by a company representative that "there were hundreds of pilots in the military" employed by TSA who were "constantly coming and going."



# Outcome: Porter v. Trans State Holdings, Inc.



- The District Court granted summary judgment for the employer.
- The court found that Porter failed to provide evidence showing his military status was a “substantial or motivating factor” in the promotion denials.
- The comments about his service were considered “stray remarks” because they were not made by decision-makers or in relation to the promotion decision. As such, they were not evidence of animus in the decision-making process.
- Moreover, the statements themselves were not evidence of hostility toward the military or military leave. Instead, the company had taken a very pro-military stance in its policies and approach in other contexts.
- The court found Porter could not demonstrate that the employer’s reason for not promoting him, (i.e., he was viewed as negative and antagonistic and thus lacked leadership skills), was a pretext for USERRA discrimination.



# Lessons Learned: Porter v. Trans State Holdings, Inc.



- Document legitimate business reasons: Maintain detailed records of promotions and performance evaluations. There is no statute of limitations for a USERRA claim, so keeping such records is crucial.
- Promote a military-friendly culture: Actively promoting and documenting a veteran-friendly workplace culture can be a strong defense against USERRA claims.
- Train managers on USERRA: Managers must be trained to avoid even subtle remarks about military service and to ensure leave and promotions are handled without bias. While the remarks here were not sufficient, the claim might have been avoided or more easily dismissed without them.

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# Case 10: EEOC v. Polaris Industries, Inc. No. 5:24-cv-1305 (N.D. Ala. Filed Sept. 26, 2024)

- **Relevant Law: The Pregnant Workers Fairness Act (PWFA).**
- What it is: A federal law requiring employers with 15 or more employees to provide reasonable accommodations for a known limitation related to pregnancy, childbirth, or related medical conditions, unless it would cause an “undue hardship.”
- Who is covered: Employees and applicants at private and public sector employers with 15 or more employees.
- **Key obligation: Provides for temporary, reasonable accommodations for pregnant workers, even if the worker temporarily cannot perform an essential function of their job, and as long as it is for a short duration. Prohibits forcing leave as an accommodation.**





## Facts: EEOC v. Polaris Industries, Inc.

- The claimant, a manufacturing worker, notified Polaris of her pregnancy and provided a doctor's note restricting her from working more than 40 hours per week because of her pregnancy.
- Polaris enforced its policy of mandatory overtime to deny the request, based on the fact that the overtime policy is an essential function of the job.
- Polaris also assessed attendance points against the employee for absences related to her medical appointments.
- The claimant resigned to avoid further discipline and for her health.
- EEOC alleges that the company had excess employees on the claimant's assembly line who could have covered the overtime.





# Outcome: EEOC v. Polaris Industries, Inc.



- Lawsuit, filed by the EEOC, resulted in a consent decree for \$55,000.
- EEOC stated in response to the decree: “Employers should be on notice that since June 27, 2023 it has been illegal under the PWFA to deny reasonable accommodations to employees with known limitations related to their pregnancy, **even if the employee is temporarily unable to perform an essential function of her job, provided that she will be able to perform that function in the near future.**”
- This is a different standard than the ADA and highlights the EEOC’s interpretation of the PWFA with respect to temporary suspension of essential functions due to pregnancy, child-birth or related conditions.



# Lessons Learned: EEOC v. Polaris Industries, Inc.



- Employers must recognize a request for accommodation related to a known pregnancy or medical limitation.
- Consider all reasonable options: A rigid “mandatory overtime” policy is not a defense if a simple accommodation, like excusing overtime, is available and does not cause an undue hardship, even if working mandatory overtime is an essential function and might not have to be accommodated under the ADA.
- Do not directly or indirectly force leave: An employer cannot force an employee into a situation where they must choose between their health and their job.
- Review all policies, including attendance policies, for PWFA compliance and train management/supervisors/HR.



# Case Study: Bento v. City of Milford, 213 F. Supp. 3d 346 (D. Conn. 2016)

- **Relevant Law: The Family and Medical Leave Act (FMLA).**
- What it is: Provides eligible employees with job-protected, unpaid leave for qualifying medical reasons.
- Who is covered: Employers with 50 or more employees within 75 miles.
- Key obligation: Prohibits interference with or retaliation against employees for taking FMLA leave.
- **Issue: When can employer insist on medical certification from a specialist to approve leave and/or fitness for duty certification before returning an employee to work after FMLA leave?**





# Facts: Bento v. City of Milford



- Erica Bento requested a continuous leave of absence due to stated “severe anxiety.”
- In support of her leave, Erica submitted certification from her primary care doctor, who indicated that Erica was “under care of psychiatrist and therapist.”
- The City required a “new” certification from the “treating psychiatrist” and once submitted, leave was approved.
- The City also required a fitness-for-duty certification from the same psychiatrist at the conclusion of Erica’s leave to certify she could safely perform her job.
- The same psychiatrist certified Erica to return with a generic note, but the City required the psychiatrist to review the job description and confirm Erica could perform the specific job duties, holding up Erica’s RTW for 6 days.



## Outcome: Bento v. City of Milford (Initial Medical Certification)



- Erica sued claiming the City interfered with her FMLA rights when it required her to provide a second initial certification.
- The court found no interference occurred because Erica's primary care doctor "repeatedly" referenced her treating psychiatrist when describing the basis for FMLA leave.
- It was acceptable to request that the treating psychiatrist cure the ambiguities in the medical certification.
- The City also clearly laid out the specific actions needed to cure the deficiencies in the original certification and gave Erica ample time to obtain the information.



# Outcome: Bento v. City of Milford (Fitness for Duty)



- Erica also claimed FMLA interference based on the City delaying her return to work and requiring her to provide additional information from the psychiatrist about her ability to return.
- The court found the delay in Erica's return and the requiring of a more specific fitness-for-duty certification from the psychiatrist was not FMLA interference.
- It was not improper for the City to require this information to be provided by the treating psychiatrist, as opposed to a primary care doctor.
- An employer also has the right to insist that the health care provider review the job description when confirming the employee can perform his/her job duties.



# Lessons Learned: Bento v. City of Milford

- Where a provider completing the medical certification appears to have had little to no role in treatment of the condition relevant to the leave request, and there is reference to a specialist, an employer can seek certification from the specialist.
- It, however, must be clear that the primary care doc is relying on (and refers to) treatment provided by a specialist.
- If unsure or if vague, do not seek additional certification, or delay reinstatement.





# Case Study: Hernandez v. Bridgestone, 931 F.3d 940 (8th Cir. 2016)



- Relevant Law: The Family and Medical Leave Act (FMLA).
- What it is: Provides eligible employees with job-protected leave for qualifying medical and family reasons.
- Who is covered: Eligible employees at covered employers.
- Key obligation: Eligible employees are entitled to the equivalent of 12 weeks of leave.
- **Issue: How to calculate an employee's FMLA allotment when full weeks are not taken.**



# Facts: Hernandez v. Bridgestone

**Facts.**

- Hernandez requested and was approved for intermittent FMLA leave to care for his asthmatic son.
- Bridgestone based Hernandez's FMLA leave entitlement on his fixed work schedule as a tire builder, giving him 504 hours of leave.
- Bridgestone counted the overtime shifts that Hernandez missed when counting his absences against his leave entitlement.
- After exhausting his FMLA leave, Hernandez missed more shifts, some of which were OT shifts, to care for his asthmatic son.
- He was disciplined and ultimately terminated.
- Hernandez filed suit claiming his FMLA rights had been violated and claiming FMLA interference.



## Facts: Hernandez v. Bridgestone (Cont.)

- When OT was needed, Bridgestone posted an overtime sign-up sheet where hourly tire builders, like Hernandez, could express their interest and availability.
- Employees were selected from the sheet based on seniority and the amount of OT they worked that year; if selected, they were required to be present and to work a 12-hour overtime shift.
- Employees who failed to report for an OT shift were subject to discipline, **unless the absence was excused.**
- If an absence was for FMLA reasons, it was excused, but the full 12-hour overtime shift was deducted from the employee's FMLA entitlement.



# Outcome: Hernandez v. Bridgestone



- The District Court found in favor of Hernandez on his FMLA interference claim, finding OT was voluntary and should not have been deducted from his leave entitlement.
- On appeal, the Eighth Circuit disagreed that the OT was voluntary. It was instead mandatory because it was part of Hernandez's normal workweek if he offered to be selected and was in fact selected.
- Because it was mandatory, Bridgestone could deduct from Hernandez's annual allotment for the scheduled overtime shifts that Hernandez missed.



## Outcome: Hernandez v. Bridgestone (Cont.)

- While OT shifts could be deducted from Hernandez's FMLA allotment because they were mandatory once an employee was selected, the Eighth Circuit still found in favor of Hernandez.
- Because the OT was mandatory, Hernandez's OT hours should have been included when Bridgestone calculated Hernandez's FMLA entitlement, but they weren't.
- By scheduling mandatory overtime hours that were not included in Hernandez's FMLA leave allotment, but which were deducted from his FMLA entitlement when he missed an overtime shift, "[Bridgestone] denied [Hernandez] FMLA benefits to which he was entitled."



# Lesson Learned: Hernandez v. Bridgestone

- An employer may convert fractions of a workweek to their hourly equivalent so long as the conversion equitably reflects the employee's total hours worked. FOH 39e01, 29 C.F.R. § 925.205(b)(1)





## Batten Down the Hatches: Prepare Your Team for the Rough Waters of Employee Challenges



**Kasey M. Cappellano**

Partner

402.231.8958

[kasey.cappellano@kutakrock.com](mailto:kasey.cappellano@kutakrock.com)



**Meaghan Gandy**

Partner

402.231.8910

[meaghan.gandy@kutakrock.com](mailto:meaghan.gandy@kutakrock.com)

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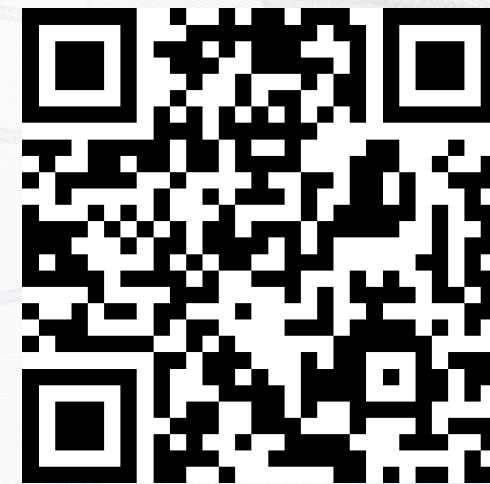
# Roadmap

- Multiple Choice
  - Different measures to use to protect the company
- Lightning Round
  - USERRA
  - NLRA
- Brain Teasers
  - DEI



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# Multiple Choice



# Protecting the Company

- **Company reputation and goodwill**
- **Company confidential information and trade secrets**
- **Employee safety**



# Protecting the Company

- You are the General Counsel for ABC Company. You wake up one morning and see your CEO and CHRO (each married to a different person) caught on the kiss cam at a Coldplay concert. The CHRO reports directly to the CEO.
- The story has gone viral. Your CTO calls you at 6 a.m. to tell you that the website has crashed from all the traffic.
- The CEO and CHRO deny an affair, although the CHRO admits she is separated from her husband.



# Protecting the Company

- How do you respond as General Counsel?
  - A) Do nothing. They are both consenting adults, plus they denied an affair.
  - B) Hire an outside law firm to conduct an investigation. Place the CEO and CHRO on Administrative Leave.
  - C) Ask one or both individuals to “voluntarily” resign.
  - D) Fire the CEO, as the more senior individual in the situation.
  - E) Resign immediately and move to the Bahamas.





# Protecting the Company

- Joan has worked for the Company for 20 years. She is the glue that holds the office together. Recently Joan has had a tough time, losing both of her parents and her son in a tragic accident. Joan comes to HR and says she might need a break because she is having dreams about coming into the office and killing herself. She says she thought about bringing a gun with her to work today .



# Protecting the Company

- How do you respond to Joan and what do you do?
  - A) Search Joan's belongings to confirm she does not have a weapon.
  - B) Call the police and confine her in your office until they arrive.
  - C) Call Joan's emergency contact to pick her up and offer her a leave of absence.
  - D) Fire Joan and ban and bar her from the facility.
  - E) A and B.
  - F) A and C.





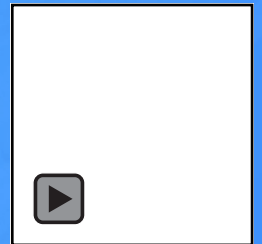
# Protecting the Company

- Joan takes an extended leave of absence and seeks psychiatric help. Joan posts on Facebook that she has anxiety and depression. Company employees start receiving anonymous emails with clips from a scary movie. One email references Joan of Arc. Yesterday the CEO received an email directly from Joan saying she was going to turn the office into Halloweentown. The CEO forwards the email to you.



# Protecting the Company

- What steps do you take?
  - A) Ask IT to block the email addresses.
  - B) Contact Joan and ask if she is still seeking treatment.
  - C) Fire Joan for making threats in the workplace.
  - D) Remind employees of the workplace violence policy and hire additional security.
  - E) Do nothing.





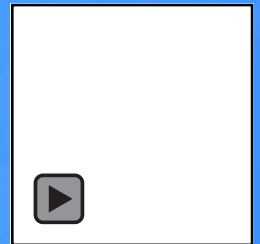
# Protecting the Company

- Jack, your CFO, goes viral on the internet for his LinkedIn post telling people to be nicer to the “Phillies Karen” because his Christian faith tells him to be kind. The Company starts receiving threats and is all over the news.



# Protecting the Company

- How do you respond as General Counsel?
  - A) Ask the CFO to issue a public apology.
  - B) Do nothing. The CFO can make a statement about his religious convictions under the First Amendment.
  - C) Fire the CFO.
  - D) Provide the CFO with your social media policy and ask him to make it clear his post does not express the views of the Company.





# Protecting the Company

- The Company is a manufacturer that maintains a number of tools for its employees to use on the job. Recently several large tools have gone missing.
- A new employee, Carlos, informs a supervisor that he witnessed Jenny, a five-year employee, coming from the tool shed, looking furtive. When Jenny saw Carlos, she looked startled and made a comment about looking for a leaf blower to take care of some debris. Jenny's duties do not include taking care of debris.
- The supervisor goes to HR to report this. He also states that Jenny is going through a messy divorce and has commented about needing money.

# Protecting the Company

- What steps should you take?
  - A) Fire Jenny and call the police.
  - B) Search Jenny's person.
  - C) Search Jenny's work area.
  - D) Search Jenny's vehicle.
  - E) B through D.
  - F) C and D.





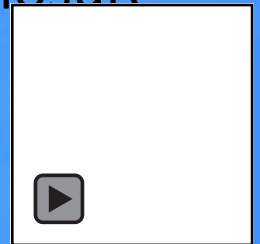
# Protecting the Company

- Everyone at a small Company based in Ohio has either sales or design responsibilities or both. Company is inventing a new technology that will change the healthcare model. You are hiring one new employee to help design the product, and two employees to help sell the product. You want to be sure you are protecting Company assets.



# Protecting the Company

- To protect the Company, you should do the following:
  - A) Have all current and new employees sign a nondisclosure, noncompete and nonsolicitation agreement.
  - B) Have just the new employees sign a nondisclosure, noncompete and nonsolicitation agreement.
  - C) Have all current and new design employees sign a nondisclosure and noncompete and all current and new sales employees sign a nondisclosure and nonsolicitation agreement.





# Protecting the Company

- John works for the Company as a chemist, and his job involves manipulation of dangerous substances. He has previously disclosed use of medication that can make him drowsy, but that his doctor said would not impact his work.
- He arrives at work one morning disheveled with red eyes. You see him getting a large cup of coffee. You say “good morning,” and John replies “hi” but his eyes appear unfocused.



# Protecting the Company

- As the HR director you should:
  - A) Ask John how he is feeling today.
  - B) Ask John's supervisor to check on him several times today and report his observations.
  - C) Send John home for some rest.
  - D) Send John for a "random" drug test immediately.
  - E) A and B.





A low-angle shot of a sailboat's sails against a bright blue sky with wispy white clouds. The sails are white and blue, with some red and yellow accents. The rigging is visible, and the overall scene is bright and airy.

# Lightning Round



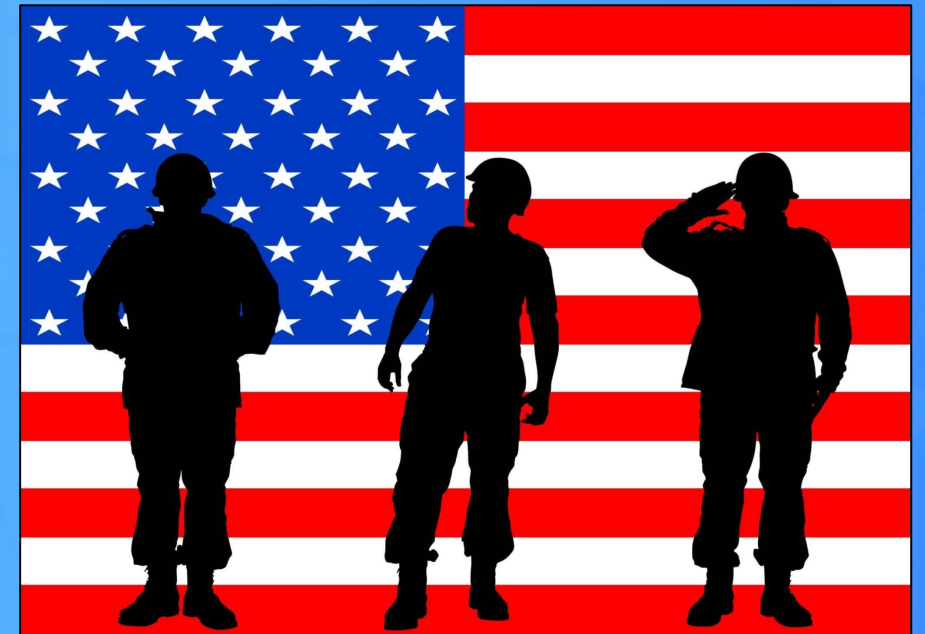
# USERRA

- USERRA ensures civilian jobs of servicemembers (including Reserves and National Guard) and veterans are not jeopardized by military service.
- Five-year limit on total service for same employer (with exceptions).
- Reemployment in position that would have been obtained with continuous employment – if requested within specified time frame.
- Antidiscrimination/antiretaliation provisions.
- Rights upon return.
- 38 U.S.C. § 4302(b) restrains state laws and contracts limiting USERRA rights.



# USERRA

- The Company requires its employees to sign an arbitration agreement applicable to all claims, including those arising under USERRA. Is this permissible?
- The Company does not require arbitration of claims. However, it does require employees to agree to a 90-day mediation process prior to commencing suit on any claim, including USERRA claims. Is this permissible?



# USERRA

- An employee is irregularly called to Reserve duty. Prior to each occasion, she provides one week of advance notice. On the next occasion, the employee emails the Company telling her supervisor she will not be present starting that same day. When she returns, she explains that she was on a classified mission that could not be discussed. Must the Company reinstate her?
- An employee is irregularly called to Reserve duty. Prior to each occasion, she provides one week of advance notice. On the next occasion, the employee emails the Company after one week's absence, telling her supervisor she will be on military leave for two more days. She apologizes for inadvertently neglecting to provide notice. Must the Company reinstate her?





# USERRA

- An employee asserted well-founded claims against the Company for retaliation under USERRA. The Company settled the claim privately with the employee for approximately \$50,000. Does this settlement violate USERRA?
- An employee asserted well-founded claims against the Company for retaliation under USERRA. The Company settled the claim privately with the employee for approximately \$500. Does this violate USERRA?



# USERRA

**DENIED**

- An employee regularly performs weekend drills in the National Guard. Prior to each drill, the employee requests permission. On a single occasion, the Company denies the request due to the undue hardship it would have caused. Is this permissible?
- An employee volunteers for a tour of duty. The Company tells him that they will not hold his job because the duty is voluntary, not mandatory. Is this permissible?

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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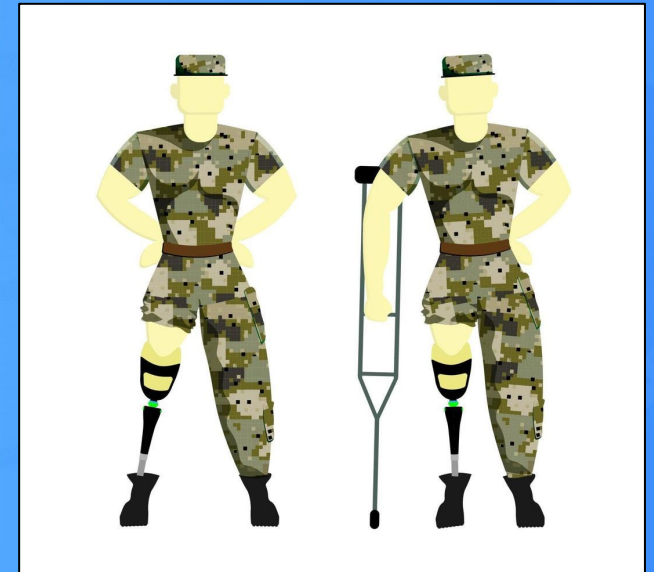
# USERRA

- A salaried, exempt employee works Monday and Tuesday and then performs military duty the remainder of the week. Can the employer deduct three full days' pay from his salary for that week?
- A salaried, exempt employee in the National Guard volunteers for additional training. He tells the Company that he is going to request the training be scheduled in two- to three-day increments that would straddle two partial work weeks each month. The Company believes employee is trying to manipulate the training schedule to ensure he receives his entire salary every week. Can the Company require him to request his training occur over one single workweek?



# USERRA

- A servicemember serves as a radiology tech for the Company and is required to frequently walk as part of his duties. During a tour of duty, he suffers the loss of a lower limb along with partial paralysis. When he returns, he is unable to perform the essential functions of his role. Can the Company terminate his employment?
- The Company voluntarily provides pay for jury duty for up to five workdays. Employee is called to a year-long tour. The Company does not pay her for this time. Is this permissible?





# National Labor Relations Act (NLRA)

- **NLRA is enforced by the National Labor Relations Board**
- **Section 7 of the NLRA:** Employees have the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection[.]”
- **Section 8 of the NLRA:** It is an unfair labor practice “for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” by Section 7.

# NLRA

- The NLRA only applies to employers with unionized workforces?
- The NLRA protects all employees in the workforce?



Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



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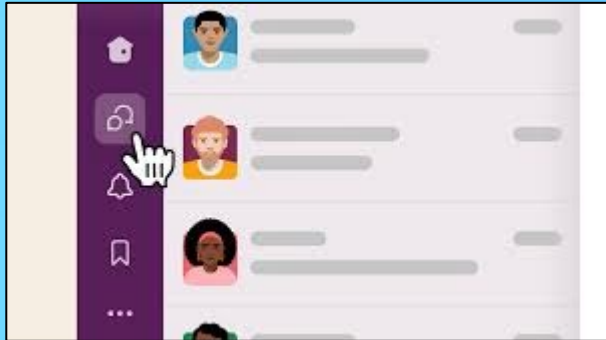


# NLRA

- Joe posts on his Facebook that his pay rate is not high enough. One of his coworkers liked the post. Did he engage in protected concerted activity under the NLRA?
- Susan complains to HR that her parking spot is not close enough to the entrance and she does not feel safe walking to her car at night. She asks the Company to hire security for all employees leaving at night. Did she engage in protected concerted activity under the NLRA?



# NLRA



- Jerry sends a Slack message on the all-Company thread that he is upset the Company fired Jack and refused to sponsor his visa. He asked other employees to urge the Company to rehire Jack. Did Jerry engage in protected concerted activity?





# NLRA

- Linda, a new entry level employee, wears her new Meta Raybans to the office. Linda is invited to a meeting with HR, but HR asks her to leave her Raybans at her desk for the meeting. Can HR instruct Linda to leave her Raybans at her desk for the meeting?
- Jim works in a manufacturing plant. For safety, the Company prohibits employees from bringing their phones onto the production floor. Jim brings his phone on the floor during a break and is disciplined. Jim claims he was trying to record an unsafe working condition. Can Jim be disciplined?



# NLRA

- The Company prohibits employees from using Company email during working time for personal purposes. Joan sends an email to several coworkers about her church at 1 p.m. Several weeks later at 4:30 p.m. Richard sends an email about union organizing. Can the Company punish Richard for sending an email during working time?
- The Company requires employees to wear Company-issued shirts. Joe adds a “Black Lives Matter” button to his shirt. Joe and a few other employees have been complaining about discrimination. Can the Company make Joe remove the button?



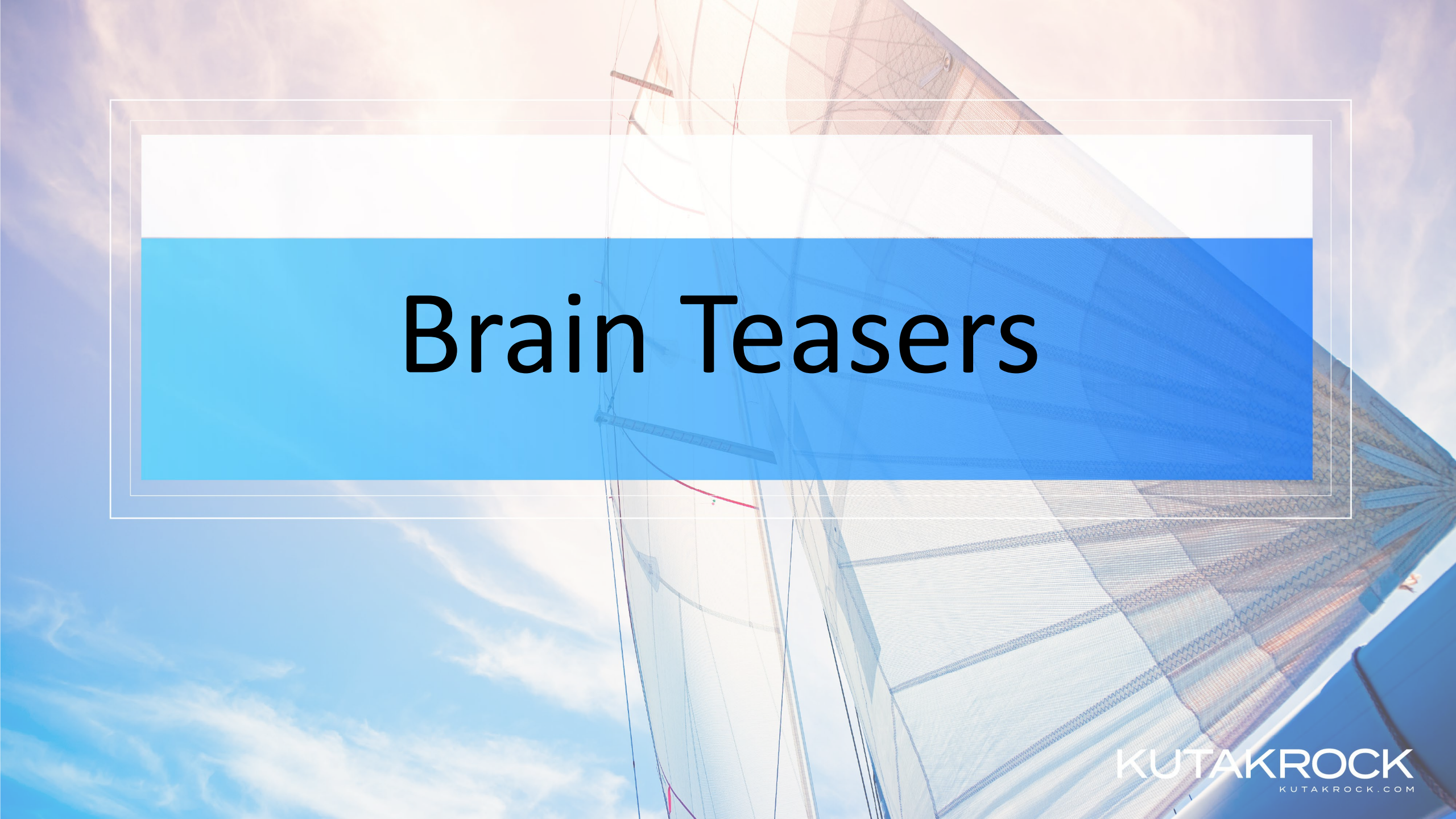


# NLRA

- Jessica goes around the office one day asking everyone to buy her daughter's girl scout cookies. Three days later Mike goes around the office asking everyone to join a new union. Can the Company punish Mike for violating the solicitation policy?
- What if Mike was asking people to join his union during their lunch break, and the Company also punished Jessica for trying to sell girl scout cookies. Can the Company punish Mike for violating the solicitation policy?





A low-angle shot of a sailboat's mast and sails against a bright blue sky with wispy clouds. The sails are white with blue and red accents. A semi-transparent blue rectangular box is centered over the image, containing the text 'Brain Teasers'.

# Brain Teasers



# The Trump Administration and Diversity Equity and Inclusion

- Current administration has taken steps to eliminate “DEI” in employment, protections for transgender/nonconforming individuals and disparate impact liability.
- Executive orders affecting contractors, recipients of federal funds, and large private employers.
- Prohibited activity includes:
  - Preferential treatment to individuals or groups based on protected characteristics.
  - Use of facially neutral characteristic as “proxy” for protected class.
  - Different forms of training based on protected class.
  - Spaces, programs, opportunities or groups limited to those in protected classes.
- *Ames v. Ohio Dept. of Youth Serv.* – evidentiary burden in reverse discrimination is identical to traditional claim.

# DEI – Scenario 1

- Several years ago, the Company made a public commitment to diversity and announced a specific hiring procedure.
- For each position: (1) all applicants must meet specified minimum requirements; (2) at least four people must be interviewed; (3) at least two applicants must be something other than cisgender males; and (4) at least two applicants must be non-white. There is no limit to the total number of applicants who can be interviewed but, in practice, the recruiting timeframe generally allows for no more than five interviews. There is no preference for any gender or race when making a hiring decision among the applicants.
- Jeremy, a white male, applies for a position with the Company and is not selected for an interview, although other white males are interviewed for the role and one of these is hired.





Jeremy files suit for discrimination. Will he prevail?

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# DEI – Scenario 2

- Melissa confides in a colleague that she holds a bona fide religious belief in “biological reality” and rejects the concept of transgender “ideology.”
- The Company hires a transgender woman, Lee. Lee learns about Melissa’s prior comment, although Melissa says nothing to Lee. Lee starts engaging in pranks targeting Melissa, including placing plastic wrap on a toilet seat before Melissa uses it, leaving behind tampons that appear to have green “blood” on them, and hiding realistic-looking spiders in the toilet paper.
- Melissa complains that she feels targeted for her religion and because she must share the bathroom with a transgender woman. After an investigation, the Company ultimately tells Lee that she is not allowed to use the women’s bathroom from 9:30 to 10:30, 1:30 to 2:30 or 4:00 to 4:30. The Company states it will sweep for bathroom pranks at the start of each timeframe.





Does Lee, Melissa or both have a claim for discrimination?

# DEI – Scenario 3

- Charity is an organization that provides services for immigrant populations.
- Charity posts a job for a client-liaison position, working directly with immigrants.
- In keeping with Charity’s mission, it states that it will prioritize candidates with genetic and/or personal ties to specific countries from which most of their immigrants arrive, which includes countries in Africa and South America.
- Sarah, a white woman, applies for the job, but is ultimately told that a different candidate with closer ties to the immigrant community was selected.







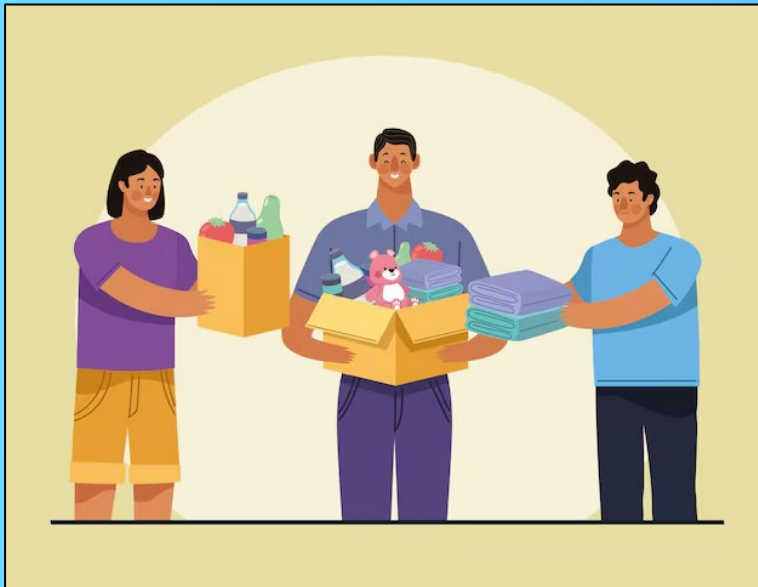
Is Charity permitted to make a distinction between candidates based on “genetic and/or personal ties with specific countries”?

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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# DEI – Scenario 4



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**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

- The Company encourages the creation of affinity groups/employer resource groups. One of its groups was started by a group of Black Baptist employees who focus on charitable activities. Many employees in the group are connected to wealthy philanthropic families.
- Tori is not Black or Baptist, nor does she care about charitable activities. She intends to participate in the group's altruistic events to make social connections with wealthy families.
- The Company allows her to join the affinity group over objections of some of the members.

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

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Was the Company right to allow Tori to join the affinity group?

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IN AN UNPREDICTABLE ENVIRONMENT

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# DEI – Scenario 5

- Laura is a white woman working for the Company. Laura's direct supervisor, Todd, is a white man. Laura realizes that Todd is married to a black woman after seeing a wedding photograph on his desk.
- After four years in the same role, Laura applies for a competitive promotion that requires at least two years of tenure with the Company, and preferably more.
- Rachel, a black woman who has been working for the Company for just over two years, also applies for the role.
- When Todd announces that Rachel was selected for the role, he jokes that he chose her in part because she “looks just like his wife” and will “keep him in line.”





If Laura files suit for discrimination, will she prevail?

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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# DEI – Scenario 6

- Technology Company provides on-site meals, napping pods and other conveniences that encourage employees to remain at the workplace late into the night.
- The CEO of Technology Company regularly holds impromptu staff meetings after regular business hours. CEO becomes familiar with employees and collaborates with them on important projects during these meetings.
- Technology Company overwhelmingly promotes the employees who attend these meetings.







Is Technology Company permitted to make promotion decisions on this basis?

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

  
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# Thank you to our Vendors!

QUESTIONS? EMAIL:  
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Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT



Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



## Adrift to Anchored: One Professional's Journey to Inner Peace



**Todd C. Kinney**

Partner

402.231.8968

[todd.kinney@kutakrock.com](mailto:todd.kinney@kutakrock.com)

Setting Sail with Certainty: **Compliance Strategies** in an Unpredictable Environment

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

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# I DIDN'T BELIEVE IT EITHER

One Dad's Discovery  
That Everything Is Better  
Without Alcohol

## TODD KINNEY



# Thank you to our Vendors!

QUESTIONS? EMAIL:  
[POLLS@KUTAKROCK.COM](mailto:POLLS@KUTAKROCK.COM)

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT



Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

## Anchoring Down Worksite Compliance: Updates and Insights on Immigration Changes Impacting U.S. Companies and Their Workers



**Clete P. Samson**

Partner

402.661.8665

[clete.samson@kutakrock.com](mailto:clete.samson@kutakrock.com)



**Bob M. Wees**

Associate

402.231.8352

[bob.wees@kutakrock.com](mailto:bob.wees@kutakrock.com)

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# EXECUTIVE ORDER 14159 “PROTECTING THE AMERICAN PEOPLE AGAINST INVASION” – JANUARY 20, 2025

- States that the primary mission of ICE is the faithful execution of immigration laws related to illegal entry and unlawful presence aliens in the United States
- Civil Fines and Penalties against “those who facilitate such aliens’ presence in the United States”

- Revokes Biden Administration Priority Memos and Orders
- Prioritizes prosecution of criminal offenses related to unauthorized entry or continued unauthorized presence of aliens in the United States

# WHAT IS ICE?

ICE was created in 2003 through a merger of the investigative and interior enforcement elements of the former U.S. Customs Service and the Immigration and Naturalization Service. ICE now has more than 20,000 law enforcement and support personnel in more than 400 offices in the United States and around the world.

ICE agents are federal law enforcement officers vested with the authority to carry weapons, interrogate, detain and arrest individuals suspected of being removable from the United States, and to interview witnesses, and seize documents and other property. ICE was formerly known as the “INS” (Immigration and Naturalization Services).



# WHAT AUTHORITY DOES ICE HAVE IN THE UNITED STATES?

“ICE” stands for “U.S. Immigration and Customs Enforcement.” ICE is an agency of the U.S. Department of Homeland Security responsible for the enforcement of the immigration and customs laws of the United States. In addition to identifying and arresting those individuals who are in the country without authorization, ICE is also responsible for ensuring employer compliance with employment verification laws.

ICE maintains general authority to detain aliens who are subject to removal from the US or placement into removal proceedings with U.S. immigration judges. Immigration and Nationality Act §§ 235, 236, 241, 8 U.S.C. §§ 1225, 1226, 1231.

# IMMIGRATION ENFORCEMENT IN THE FIRST SIX MONTHS OF TRUMP ADMINISTRATION

- Increased ICE I-9 Audits
- Return to ICE RAIDs and Worker Arrests on Worksite
- Removal of restrictions on ICE agents preventing arrests from taking place at sensitive locations—churches, schools, hospitals, etc.
- Increased USCIS scrutiny of visa petitions
- Termination of Parole and TPS programs impacting US workforce



# THE IMPORTANCE OF IMMIGRATION RESPONSE TRAINING AND PREPAREDNESS





# Surge in ICE Arrests and Enforcement Activity

- **Border Czar – Tom Homan**—recently stated that “large scale raids will begin as early as January 21” and ICE “will focus on the worst first, public safety threats first, but no one is off the table. If [an individual] is in the country illegally, they got a problem.”
- 308 arrests were made on January 21, most of which were foreign-born nationals who entered the country without authorization and who had some criminal convictions in the U.S.
- 1,200 arrests were made on January 26 alone (a Sunday).
- **The Trump administration is expected to increase I-9 audits to 12,000 per year.**
  - Industries such as agriculture, hospitality, construction, and manufacturing have consistently been subject to these types of audits and are expected to continue being key targets for scrutiny in 2025 and beyond.



# Industries Heavily Impacted by Use of Fraudulent Documents

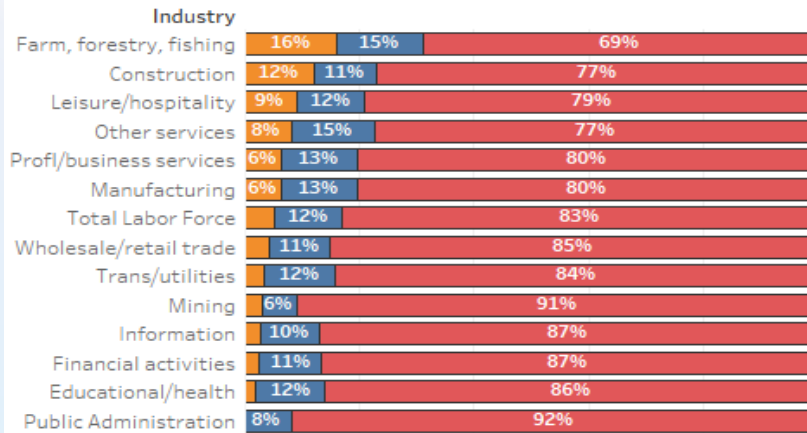
## Unauthorized workers



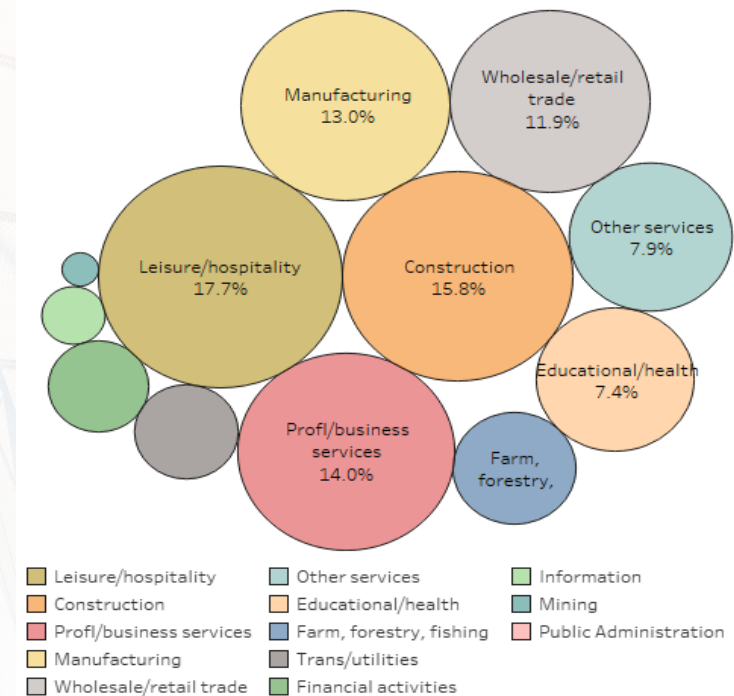
Here are the industries that rely most heavily on unauthorized workers, along with a breakdown of the industries that employ the biggest share of share of all unauthorized workers. SOURCE: Pew Research Center

Unauthorized Im.. Legal Immigrants U.S.born

### By industry employment



### Share of all unauthorized workers



# Immigration enforcement—INCREASED USE OF Notice of inspection TO CONDUCT FORM i-9 AUDITS

Notice of Inspection Served on Company

Three Days to Produce I-9s in Original Form

I-9 Review

Notice of Alleged Violations/Notice of Intent to Fine

Formal Litigation and Request for Hearing with ALJ



# Form I-9 Audits and Related Violations



Knowing hire of unauthorized aliens



Knowingly continued employment of unauthorized aliens



Civil/Administrative



Verification Violations

# Civil Penalties for Knowingly Employing Unauthorized Workers, Document Fraud and Discrimination

| Offense   | Penalty            |
|-----------|--------------------|
| 1st Level | \$698 - \$5,579    |
| 2nd Level | \$5,579 - \$13,946 |
| 3rd Level | \$8,369 - \$27,894 |

Fine amounts effective February 12, 2024



# Form I-9 Paperwork Violations

- Form violations = \$281 - \$2,789\*\*\*
- Violation percentage
- Technical vs. Substantive
- Enhancement matrix

**\*\*\* Fine amounts effective February 12, 2024**

Office of Investigations

U.S. Department of Homeland Security  
[Address]  
[Address]



U.S. Immigration  
and Customs  
Enforcement

## NOTICE OF INSPECTION

[Date]

[Name of Company Official]  
[Company Name]  
[Company Address]

Dear Sir/Madam:

Section 274A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, requires employers to hire only United States citizens and aliens who are authorized to work in the United States. Employers must verify employment eligibility of persons hired after November 6, 1986 using the Employment Eligibility Verification Form I-9.

U.S. Immigration and Customs Enforcement (ICE) regulations require the provision of three days notice prior to conducting a review of an employer's Forms I-9. This letter serves as advance notice that ICE has scheduled a review of your forms for Insert date and time. You may, however, waive the three-day period, should you wish to do so, by annotating and signing the bottom of this letter and advising this office of your decision.

During the review, Insert name and title of ICE point of contact will discuss the requirements of the law with you and inspect your Forms I-9. The purpose of this review is to assess your compliance with the provisions of the law. ICE will make every effort to conduct the review of records in a timely manner so as not to impede your normal business routine.

Sincerely,

Insert name  
Insert title (GS or above)

I wish to waive the three day notice to which I am entitled by regulation.

\_\_\_\_\_  
(Printed Name)

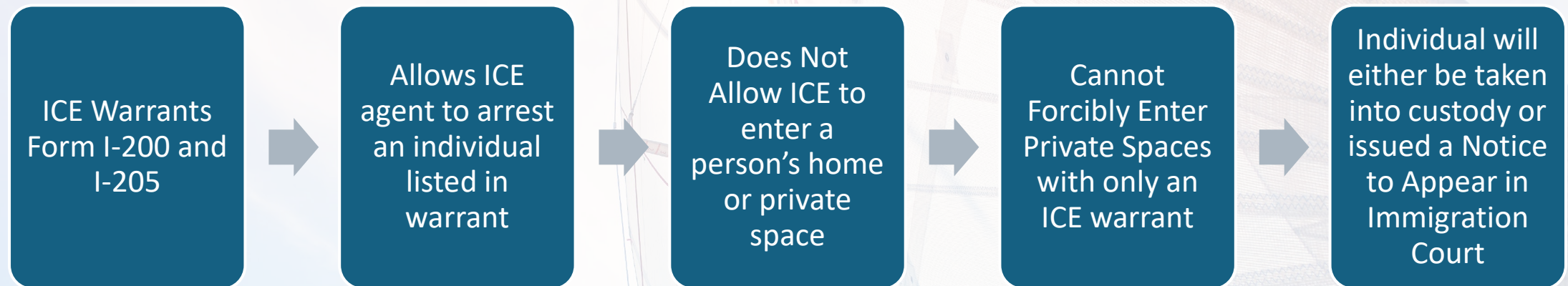
\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Date)

AILA InfoNet Doc. No. 09031660. (Posted 03/16/09)



# Immigration enforcement—increased use of ICE administrative arrest warrants at worksites



DEPARTMENT OF HOMELAND SECURITY  
U.S. Immigration and Customs Enforcement  
**WARRANT OF REMOVAL/DEPORTATION**

File No: \_\_\_\_\_

Date: \_\_\_\_\_

**To any immigration officer of the United States Department of Homeland Security:**

\_\_\_\_\_  
(Full name of alien)

who entered the United States at \_\_\_\_\_ on \_\_\_\_\_  
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation, or removal proceedings
- ☐ a designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

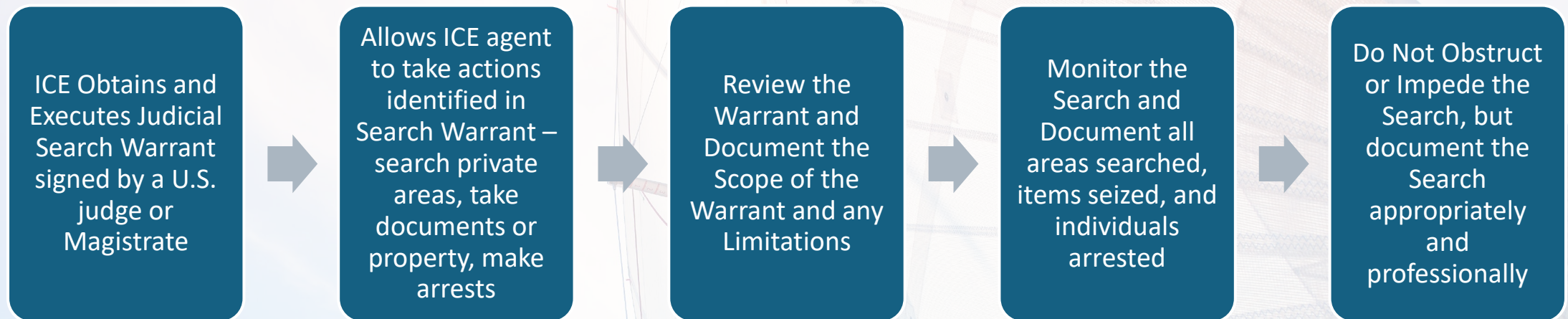
\_\_\_\_\_  
(Signature of immigration officer)

\_\_\_\_\_  
(Title of immigration officer)

\_\_\_\_\_  
(Date and office location)



# Immigration enforcement—a return to the ice raid scenarios



## UNITED STATES DISTRICT COURT

for the  
Eastern District of CaliforniaIn the Matter of the Search of  
*(Briefly describe the property to be searched  
or identify the person by name and address)*540 Oak Avenue  
Davis, California 95616

Case No.

## SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

2:11-SW-0161 EFB

An application by a federal law enforcement officer or an attorney for the government requests the search  
of the following person or property located in the EASTERN District of CALIFORNIA  
*(Identify the person or describe the property to be searched and give its location):*SEE ATTACHMENT A, ATTACHED HERETO AND INCORPORATED BY REFERENCEThe person or property to be searched, described above, is believed to conceal *(Identify the person or describe the  
property to be seized):*SEE ATTACHEMNT B, ATTACHED HERETO AND INCORPORATED BY REFERENCEI find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or  
property.**YOU ARE COMMANDED** to execute this warrant on or before 5-9-2011  
*(not to exceed 14 days)*☐ in the daytime 6:00 a.m. to 10 p.m. ☐ at any time in the day or night as I find reasonable cause has been  
established.Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property  
taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the  
place where the property was taken.The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an  
inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge*(name)*☐ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay  
of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be  
searched or seized *(check the appropriate box)* ☐ for \_\_\_\_\_ days *(not to exceed 30)*.☐ Until, the facts justifying, the later specific date of \_\_\_\_\_.Date and time issued: 4-25-2011  
9:10:00 AM  
*Judge's signature*City and state: SACRAMENTO, CALIFORNIAEDMUND F. BRENNAN, U.S. MAGISTRATE JUDGE  
*Printed name and title*Issued by  
a court.Attachment  
should have the  
name of the  
person & address  
to be seized.Signed by a  
Judge/Magistrate  
Judge



# Upending Immigration in 2025



# TOPICS FOR DISCUSSION

- Revocation and Termination of Immigration Programs
- New Regulatory Agendas by Immigration Agencies
- Increase scrutiny by USCIS regarding employment-based petitions
- Proactive Strategies for Employers





# Termination of TPS

- Since January, the Trump administration has announced the termination of TPS for multiple countries, aiming to end protections for hundreds of thousands of immigrants
- Litigation has delayed or changed the end of TPS for Venezuela, Haiti, Honduras, Nepal and Nicaragua, so many people from these countries still have protection for now
- There is no ongoing litigation for Afghanistan or Cameroon
- Employment authorization for TPS beneficiaries expires on the same date as the TPS designation

| Country     | Termination Announced | TPS Designation Through     |
|-------------|-----------------------|-----------------------------|
| Haiti       | July 1, 2025          | Feb. 3, 2026                |
| Honduras    | July 8, 2025          | Nov. 18, 2025               |
| Nepal       | June 6, 2025          | Nov. 18, 2025               |
| Nicaragua   | July 8, 2025          | Nov. 18, 2025               |
| Venezuela   | Feb. 5, 2025          | Oct. 3, 2025<br>Oct 2, 2026 |
| Afghanistan | Apr. 11, 2025         | July 14, 2025               |
| Cameroon    | Apr. 11, 2025         | Aug. 4, 2025                |

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

# Revocation of NHNV parole program

On June 12, the U.S. Department of Homeland Security began sending termination notices to approximately 530,000 individuals who entered the United States under Biden era parole program for Cubans, Haitians, Nicaraguans and Venezuelans.

Despite parolees possessing unexpired EADs, they are being informed that work authorization pursuant to the parole program has been revoked effective immediately.

Companies are on notice of such revocation effective June 12, 2025, and must undertake diligence to avoid potential knowing continued employment violations.

Workers from these four countries with EADs that contain category code C11 are potentially no longer authorized for employment and diligent inquiry is necessary to reverify work authorization.



# New Regulatory Agendas for Immigration Agencies

- **H-1B Eligibility and Compliance Reform**
- **Project Firewall**
- **Wage Level-Based H-1B Cap Selection Process**
- **Student Practical Training and Duration of Status**
- **Employment-Based Permanent Residence Eligibility**



# H-1B Eligibility and Compliance Reform

- USCIS is beginning to challenge H-1B qualification. Recent trends show a sharper focus in technology-related filings. USCIS has been increasingly questioning:
  - **Degree Relevance**—Does the candidate's field of study directly align with the job offered (e.g., Computer Engineering vs. Data Science)?
  - **Specialty Occupation Standards**—Does the role truly require a specific degree, or can it be performed by someone with broader qualifications?
  - **Level of Education**—Is a foreign Bachelor's or Master's degree equivalent to a U.S. degree in the relevant field?
  - **Job Descriptions vs. Credentials**—Do the academic records, syllabi, and coursework clearly map to the role's duties?



# Project Firewall

## Project Firewall (Department of Labor)

The initiative focuses on increased federal enforcement of the H-1B visa program.

- Industry Neutral
- Employers should expect deeper, faster, and more coordinated investigations that go beyond traditional wage-and-hour audits.
- Under Project Firewall, noncompliance may lead to debarment, not just civil penalties, impacting employers' ability to sponsor new H-1B visas in the future.

### Practical Considerations for Employers

1. Conduct an internal H-1B audit.
2. Document everything.
3. Train HR and project managers.
4. Monitor third-party placements.

# Wage level-based H-1B cap

## What's Changing?

The administration has proposed a replacement to the current random lottery with a weighted system that prioritizes higher paying jobs but still allows H-1B visas to be awarded for various wage levels

## Four New Wage Categories

| Level | Number of times entered in Selection Pool |
|-------|-------------------------------------------|
| I     | 1 entries                                 |
| II    | 2 entries                                 |
| III   | 3 entries                                 |
| IV    | 4 entries                                 |

### Search Results

Geo Level 1  
SOC Code 11-2022  
SOC Title Sales Managers

| Wage Level  | Hourly    | Yearly         |
|-------------|-----------|----------------|
| I           | US\$25.49 | US\$53,019.00  |
| II          | US\$40.82 | US\$84,906.00  |
| III         | US\$56.15 | US\$116,792.00 |
| IV          | US\$71.48 | US\$148,678.00 |
| MEAN (H-2B) | US\$56.31 | US\$117,125.00 |



# \$100,000 Fee for H-1B Visas

- A September 19, 2025, presidential proclamation bans an H-1B specialty occupation employee from entering the United States unless their employer has paid a \$100,000 fee for the sponsored employee.
- Only to H-1B petitions filed on or after September 21, 2025, who either:
  - Are outside the United States and do not have a valid visa; or
  - Are the beneficiary of a petition filed for, or approved for, consular notification, regardless of whether the beneficiary is in or outside the United States.
- The proclamation gives DHS the authority to grant exceptions to any individual, employer, or industry if it is in the U.S. national interest and does not pose a threat to U.S. national security or welfare.

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# So, who is subject and who is exempt?

- **Subject:**
  - Consular Notification H-1B Petitions
  - Change/Extension/Amendment Petitions that were Approved but only for Consular Notification
- **Exempt:**
  - Extension of Stay, Amendment, or Change of Status (If Approved)
  - Change of Employer Petitions (If Extension Approved)
  - Travel After Approval
  - \*Denied Petitions\* (refund)



# Legal Challenges

## ***Global Nurse Force v. Trump (10/03/2025)***

A coalition of healthcare, educational, and labor organizations contests the \$100,000 H-1B fee, claiming it is an unlawful executive overreach that would severely restrict their ability to recruit essential international professionals.

## ***U.S. Chamber of Commerce v. Trump Administration (10/16/2025)***

The U.S. Chamber of Commerce challenges the \$100,000 H-1B visa fee, arguing it exceeds presidential authority, violates congressional control over immigration fees, and would harm U.S. businesses by making it prohibitively expensive to hire skilled foreign workers.



# What this means for Employers

- This proclamation represents a substantial financial and procedural shift for employers seeking to hire foreign talent under the H-1B program. Employers can:
  - Review their hiring plans and timelines carefully.
  - Budget for the additional cost where applicable.
  - Consult immigration counsel to assess petition eligibility and potential exceptions.



# Strategies for Employers

- **Monitor Expiration Dates:** Track expiration dates of work authorization documents and set up reminders for timely reverification.
- **Stay Informed:** Regularly review government announcements, Federal Register notices, and E-Verify alerts for updates on program terminations and EAD validity.
- **Consistent Policies:** Create and apply compliance procedures.
- **Employee Communication:** Encourage employees to notify HR promptly if they receive any government communication regarding their immigration status or work authorization.
- **Legal Review:** Consult with legal counsel to assess risk tolerance and develop response strategies tailored to your organization's operational needs and risk profile.





# QUESTIONS?

Setting Sail with Certainty: **Compliance Strategies** in an Unpredictable Environment

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

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## Charting a Course Through Executive Orders and Other Recent Employment Law Updates



**Gigi O'Hara**

Partner

402.661.8652

[gigi.ohara@kutakrock.com](mailto:gigi.ohara@kutakrock.com)



**Marcia Washkuhn**

Partner

402.231.8763

[marcia.washkuhn@kutakrock.com](mailto:marcia.washkuhn@kutakrock.com)

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# *E.M.D. Sales, Inc. v. Carrera,* 604 U.S. 45, 145 S. Ct. 34 (2025)

- The US Supreme Court unanimously held that a preponderance of the evidence standard governs when an employer seeks to prove that an employee is exempt from the FLSA's minimum wage and overtime pay provisions.

145 S.Ct. 34  
Supreme Court of the United States.

E.M.D. SALES, INC., et al., Petitioners  
v.  
Faustino Sanchez CARRERA, et al.

No. 23-217  
|  
Argued November 5, 2024  
|  
Decided January 15, 2025



# Field Assistance Bulletin No. 2025-1



U.S. Department of Labor  
Wage and Hour Division



May 1, 2025

Field Assistance Bulletin No. 2025-1

MEMORANDUM FOR: Regional Administrators  
District Directors

FROM: Donald M. Harrison, III  
Acting Administrator

SUBJECT: FLSA Independent Contractor Misclassification Enforcement Guidance

FAB **2025-1** clarifies that DOL will no longer enforce a 2024 independent contractor rule under the FLSA issued by President Biden.

DOL issued Opinion Letter FLSA2025-2, which reinstates previously withdrawn Opinion Letter FLSA2019-6.

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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# DOL Opinion Letter FLSA 2025-02

U.S. Department of Labor

Wage and Hour Division  
Washington, D.C. 20210



FLSA2025-2

May 2, 2025

Dear **Name\***:

As you know, the Department of Labor's Wage and Hour Division (WHD) issued Opinion Letter FLSA2019-6 on April 29, 2019, in response to your request for an opinion letter regarding whether service providers working for a virtual marketplace company are employees or independent contractors under the Fair Labor Standards Act (FLSA). This opinion letter was withdrawn on February 19, 2021.

We have further analyzed Opinion Letter FLSA2019-6. From today forward, this letter, which is designated as Opinion Letter FLSA2025-2 (May 2, 2025) and reproduces below the verbatim text of Opinion Letter FLSA2019-6, is an official statement of WHD policy and an official ruling for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259.<sup>†</sup>

Reinstates FLSA2019-6 analyzing workers in the virtual marketplace and determining they are independent contractors.

## **Weighing of Factors:**

Control; Permanency;  
Worker's Investment;  
Worker's Skill; Worker's  
Opportunity for Profit or  
Loss; and Integration of  
Worker's Services.

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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# DOL Opinion Letter FLSA 2025-05

U.S. Department of Labor

Wage and Hour Division  
Washington, DC 20210



FLSA 2025-05

September 30, 2025

Dear **Name\***:

This letter is in response to your request for an opinion concerning the application of the overtime requirements of the Fair Labor Standards Act (FLSA) to your work at a restaurant and a members-only club ("members club"), which operate on the first and second floors, respectively, of a hotel, and whose ownership, management, and operations, among other things, appear common.

It is our opinion that, under the specific facts presented, you are jointly employed by the restaurant and members club. Accordingly, under these facts, all the hours that you work at the restaurant and members club must be combined for purposes of calculating your hours worked each workweek, and both the restaurant and members club are jointly and severally liable for all aspects of FLSA compliance.

This opinion is based exclusively on the facts as presented below that you provided to the Department and may not apply to different facts in this or other situations.

DOL evaluated the joint employment relationship between a restaurant and a club located in the same hotel where a hostess was performing work for both.

Found joint employment existed.

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

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# Field Assistance Bulletin No. 2025-3



U.S. Department of Labor  
Wage and Hour Division



June 27, 2025

Field Assistance Bulletin No. 2025-3

MEMORANDUM FOR: Regional Administrators  
District Directors

FROM: Donald M. Harrison, III  
Acting Administrator

SUBJECT: Prohibition on Seeking Liquidated Damages in Administrative Settlements  
under the FLSA

FAB **2025-3** clarifies that in any pre-suit investigations or resolutions, the DOL is only authorized under the FLSA to “supervise the payment of unpaid wages and **overtime**,” but not to request liquidated damages.

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

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# PAID Program

## Payroll Audit Independent Determination (PAID)

- **July 24, 2025:** The DOL's WHD announced the return of the Payroll Audit Independent Determination (PAID) program, which expedites resolution of potential minimum wage or overtime violations under the FLSA and potential violations under the FMLA.

## Charting a Course Through Executive Orders and Other Recent Employment Law Updates



**Gigi O'Hara**

Partner

402.661.8652

[gigi.ohara@kutakrock.com](mailto:gigi.ohara@kutakrock.com)



**Marcia Washkuhn**

Partner

402.231.8763

[marcia.washkuhn@kutakrock.com](mailto:marcia.washkuhn@kutakrock.com)

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# Executive Orders Impacting DEI Initiatives

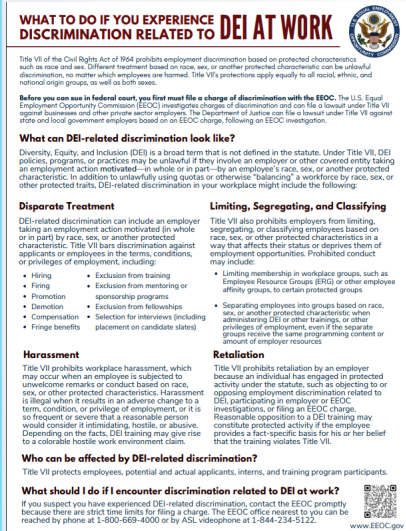
- EO 14151: “Ending Radical and Wasteful Government DEI Programs and Preferencing” (January 20, 2025)
- EO 14151: “Ending Radical and Wasteful Government DEI Programs and Preferencing” (January 20, 2025)
- EO 14168: “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government” (January 20, 2025)
- EO 14173: “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” (January 21, 2025)





# EEOC Guidance – “What You Should Know About DEI-Related Discrimination at Work” (March 13, 2025)

<https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work>



4. Do Title VII’s protections only apply to individuals who are part of a “minority group,” (such as racial or ethnic minorities, workers with non-American national origins, “diverse” employees, or “historically under-represented groups”), women, or some other subset of individuals?
7. When is a DEI initiative, policy, program, or practice unlawful under Title VII?
8. Can an employer excuse its DEI-related considerations of race, sex, or another protected characteristic, provided that the protected characteristic wasn’t the sole or deciding factor for the employer’s decision or employment action?
9. Can an employer justify taking an employment action based on race, sex, or another protected characteristic because the employer has a business necessity or interest in “diversity,” including preferences or requests by the employer’s clients or customers?
10. Can an employer’s DEI training create a hostile work environment?
11. Does Title VII protect employees who oppose unlawful policies or practices, including certain DEI practices or trainings?

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# Muldrow v. City of St. Louis (U.S. Sup. Ct. April 17, 2025)



- Ruled that a job reassignment can be an adverse employment action even without a significant change in pay or benefits.
- Employee only needs to show that a reassignment (or other employment action) was “disadvantageous” and resulted in some harm, such as a change in responsibilities or schedule, to establish an adverse action sufficient to support a claim.
- Lowers the bar for employees to sue for discrimination after a reassignment, as they no longer need to prove a “material” or “significant” disadvantage.

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# Ames v. Ohio Dept. of Youth Serv. (U.S. Sup. Ct. June 5, 2025)



- Ames, a heterosexual woman, was assigned to a new supervisor, who was gay.
- About two years after assignment to her new supervisor, Ames applied for a promotion. She was not selected and was told to consider retirement.
- A month later, Ames was demoted, and a gay man was given her position.
- Later that year, a gay woman was chosen for the position for which Ames had previously applied.
- Ames filed suit for discrimination but could not establish “background facts” needed to establish a reverse discrimination case, so her case was dismissed.
- The Supreme Court was asked to decide if a plaintiff in a majority group must demonstrate “background circumstances suggesting that the defendant is the unusual employer who discriminates against the majority” to establish a prima facie case of discrimination.
- **The Supreme Court held that Title VII does not impose a higher evidentiary burden on plaintiffs who belong to majority groups.**



# U.S. DOL Opinions Regarding FMLA Leave

- **FMLA2025-01-A (Jan. 14, 2025)** – Cannot force employees to use accrued PTO concurrently with FMLA leave if they are receiving state Paid Family Medical Leave (PFML) payments. The use of PTO to “top up” state benefits to reach 100% of an employee's pay is possible but only if agreed to by the employer and employee.
- **FMLA2025-02-A (Sept. 30, 2025)** – Calculating and tracking 12-week FMLA entitlement for employees with non-traditional schedules must be based on their actual work schedule, including mandatory overtime, excluding hours the employee voluntarily works outside their regular work schedule.





# Healthy Families and Workplaces Act (HFWA)

## Nebraska's New Sick Leave Law – Effective Oct. 1, 2025



- Employers with 11 or more employees must offer paid sick leave.
- After working 80 hours, employees must earn at least 1 hour of paid sick time for every 30 hours worked, usable in 1-hour increments unless can record smaller increments.
- Employers with 11-19 employees must allow accrual up to 40 hours per year; those with 20 or more employees must allow accrual of up to 56 hours per year.
- Unless you have a **compliant** PTO policy, or you pay out unused sick leave at the end of the year and front load the next, all unused sick leave carries over each year.
- Although carryover is unlimited, you can **cap usage annually** to 40 hours for small employers and to 56 hours for large employers.
- Sick leave can be used for personal or family health needs, or for public health emergencies.



# Nebraska Sick Leave Law – Effective Oct. 1, 2025 (cont.)



- For absences of more than three consecutive days, employers can ask for documentation supporting the need for leave (with some limitations).
- Employers must maintain records of accrued and used leave for at least two years, post notice of the law, and give written notice of the law to employees.
- Cannot retaliate for employees using or requesting paid sick leave.
- The Act provides job protection for employees using their leave, so usage up to the limits allowed by the Act (40 or 56 depending on size) must be excused.
- Notification requirements must be included in a written policy to be enforced, but if an employee could not practically give notice, the notice requirements must be excused.



# Nebraska Sick Leave Law – Effective Oct. 1, 2025

## Exemptions

- Individuals who work fewer than 80 hours in a calendar year in Nebraska
- Independent contractors
- Owner-operators
- Certain seasonal agricultural workers
- Individuals under 16
- Employees subject to the Railroad Unemployment Insurance Act





# Thank you to our Vendors!

QUESTIONS? EMAIL:  
[POLLS@KUTAKROCK.COM](mailto:POLLS@KUTAKROCK.COM)

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT



Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

## Avoiding Choppy Seas: Navigating the Wave of Employee Benefits Changes



**Brian Bartels**

Partner

402.231.8897

[p.brian.bartels@kutakrock.com](mailto:p.brian.bartels@kutakrock.com)

Setting Sail with Certainty: **Compliance Strategies** in an Unpredictable Environment

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# Charting Our Course – Today's Agenda

- Health and Welfare Benefit Litigation Trends
- Health Plans, Fringe Benefit, and Paid Leave Changes
- Mental Health Parity
- HIPAA
- Retirement Plan Trends



# Health and Welfare Benefit Litigation Trends

- Prescription drug benefits
- Artificial intelligence
- Wellness programs
- Self-dealing



# Pharmacy Benefit Manager Litigation

- Role of Pharmacy Benefit Managers (“PBMs”)
- Under ERISA, fiduciaries must discharge their duties with respect to a plan:
  - Solely in the interests of the participants and beneficiaries;
  - For the exclusive purpose of providing benefits to participants and their beneficiaries;
  - To defray reasonable expenses of administering the plan; and
  - With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- Selecting a PBM is a fiduciary decision

# Lawsuits Challenging PBM- Related Decisions



- *Lewandowski v. Johnson & Johnson* (D.N.J. 2025)
  - Health plan participants sued employer, fiduciary committee, and individual fiduciaries
  - Alleged breaches of fiduciary duty. For example:
    - Did not agree to pay only reasonable amounts for each prescription drug
    - Failed to consider all relevant facts and options, including alternative arrangements, conflicts of interest, and whether drug prices were reasonable
    - Failed to supervise third parties (e.g., broker and PBM)
    - Failed to conduct adequate review of the plan's prescription drug costs
    - "Failed to steer beneficiaries to lower-cost options"
    - Failed to engage in a prudent process for monitoring the plan's formulary



# *Johnson & Johnson* sparks other litigation...

- *Navarro v. Wells Fargo* (D. Minn. 2025)
  - Prescription drug plan participants sued employer and individual fiduciaries
- *Stern v. JPMorgan Chase & Co.* (S.D.N.Y. 2025)
  - Prescription drug plan participants sued employer, fiduciary committee, and individual fiduciaries

# Artificial Intelligence ("AI") Litigation



- AI systems being deployed for claims and appeals decisions
- *Kisting-Leung v. Cigna Corp.* (E.D. Cal. 2025)
  - Health plan participants sued Cigna for breach of fiduciary duty
    - Didn't follow plan document – used AI to analyze claims for medical necessity without review by a medical director, as required by the plan
    - Cigna deprived participants of full and fair claims reviews
    - Data showed Cigna doctors denied over 300,000 claims, spending an average of 1.2 seconds per review



# Wellness Program Litigation

- More than 12 new cases have been filed in 2025 challenging wellness programs with tobacco surcharges
- Recognizable defendants:
  - Target
  - 7-Eleven
  - Walmart
  - Tractor Supply Co.
  - Bass Pro Group
- Allege wellness programs do not comply with various requirements, including failure to offer reasonable alternative standards, failure to provide rewards, and failure to provide required notices

# Self-Dealing Leads to Litigation

- ERISA prohibits certain transactions between employee benefit plans and “parties in interest”
- *Stern v. JPMorgan Chase & Co.* (S.D.N.Y. 2025)
  - Alleges that JPMorgan and its plan fiduciaries violated ERISA’s prohibited transaction rules
- *Tiara Yachts, Inc. v. BCBS Michigan* (6th Cir. 2025)
  - Alleges that BCBSM breached its fiduciary obligations to the plan and engaged in self-dealing



# Compliance Tips for Litigation Risks

- Fiduciary committees (health and welfare and retirement)
- Ensure plan documents are up-to-date
- Have procedure to timely provide notices to participants
- Engage qualified consultants
- Request for proposal (“RFP”) process
  - Review and compare alternatives
  - Review compensation
  - Review potential conflicts of interest
- Review and negotiate all service agreements!
- Monitor service providers
- Document process for procedural prudence



# Health Plans, Fringe Benefits, and Leaves

- High deductible health plans (“HDHPs”) and health savings accounts (“HSAs”)
- Educational Assistance Programs
- Dependent Care Assistance Programs
- Family Formation Benefits
- Paid Sick Leave



# HDHP and HSA Changes



- Telehealth Services
  - Effective for plan years beginning after December 31, 2024, the safe harbor allowing HDHPs to provide first-dollar telehealth and other remote care services before participants have satisfied the statutory deductible is permanent.
- Direct Primary Care
  - Beginning after December 31, 2025, direct primary care service arrangements that meet certain requirements will not disqualify an otherwise eligible individual from contributing to an HSA.

# Fringe Benefits

- Educational assistance programs
  - Exclusion (currently \$5,250) indexed for inflation
    - Effective for payments made after December 31, 2025
- Dependent Care Assistance Programs (“DCAPs”)
  - Effective for taxable years beginning after December 31, 2025, the maximum annual DCAP exclusion increases to \$7,500 (or \$3,750 for separate returns filed by a married individual) from \$5,000
  - This amount is not subject to inflation adjustments



# Family Formation Benefits

- Emerging “in demand” employee benefit
  - Examples: Adoption assistance, surrogacy, fertility/infertility, DCAPs
- New FAQ guidance issued on October 16, 2025
  - Addresses use of “excepted benefits” to provide “fertility benefits”
    - Independent, noncoordinated excepted benefits
    - Excepted benefit health reimbursement arrangements (“HRAs”)
    - Employee assistance programs (“EAPs”)
  - Foreshadows potential new regulations to promote “fertility benefits”

# Paid Sick Leave



- On October 1, 2025, Nebraska joined 19 states with state-mandated paid leave laws
- Paid sick leave laws generally require covered employers to allow employees to accrue paid sick leave subject to various use, carryover, and accrual limits
- Common Issues
  - Multi-jurisdictional compliance
  - Using PTO to satisfy paid sick leave laws
  - Interaction with attendance policies and other federal and state employment laws
  - Tracking new amendments and paid leave laws
  - Employee communication and training



# Compliance Tips



- HDHPs:
  - Decide how to address telemedicine
  - Decide how to address direct primary care
- Decide whether to index educational assistance program benefits
- Decide whether to adjust the maximum amount of DCAP contributions
- Consider family formation benefits
  - Compliance issues
- Amend or adopt plans if necessary; provide participants with notice
- Review compliance with paid leave laws

# Mental Health Parity



# Mental Health Parity is a Priority!

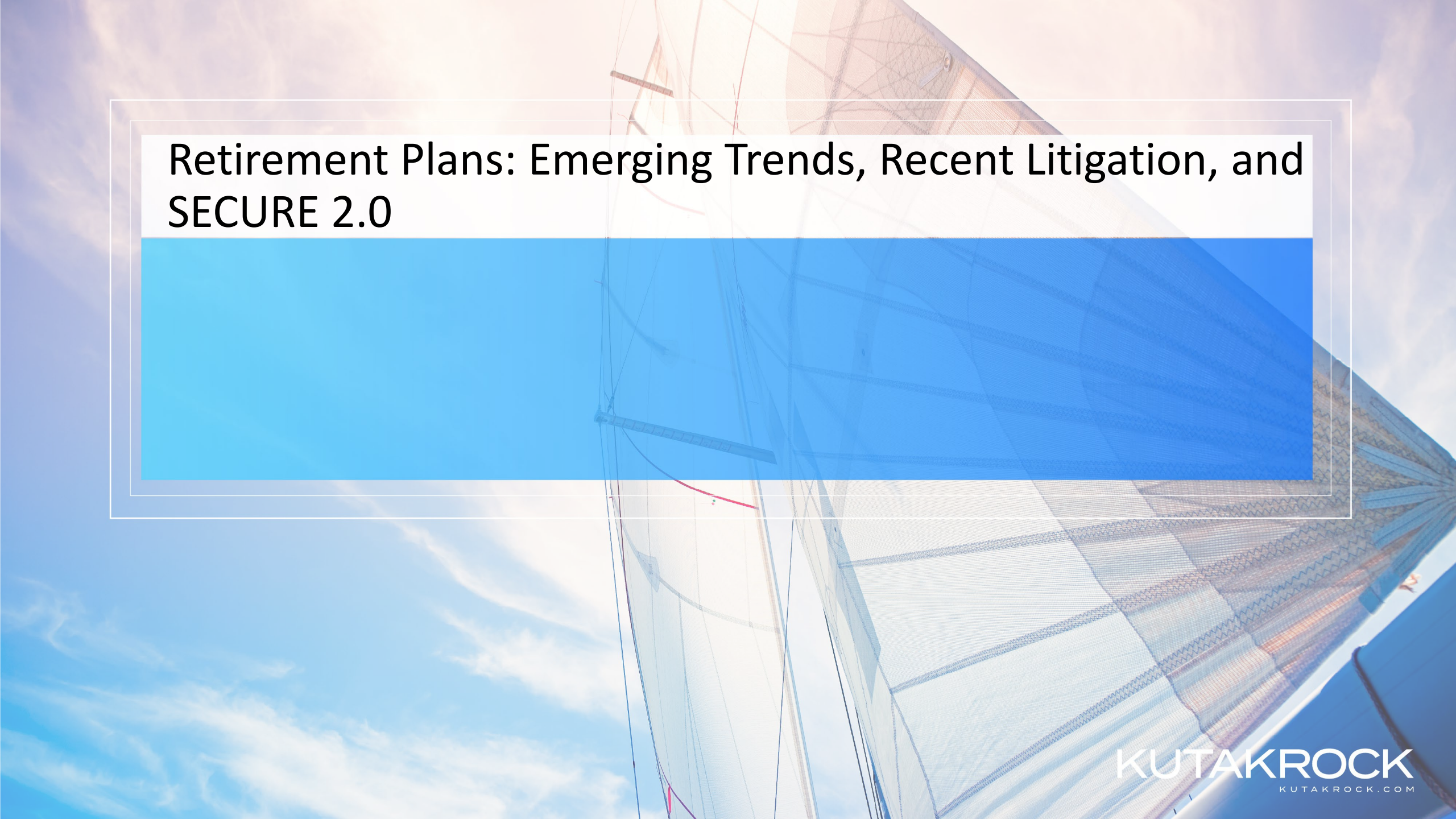
- Consolidated Appropriations Act, 2021, added requirement for plans to prepare a comparative analysis of nonquantitative treatment limitations (“NQTLs”)
- Final regulations issued in September 2024
  - Significant new requirements
- May 15, 2025: Federal regulators issue nonenforcement policy for portions of the final regulations
  - Emphasize that the *NQTL comparative analysis is still required*
- Mental health parity is top enforcement priority!

# HIPAA Changes



# Court vacates certain HIPAA rules

- April 2024: Final Regulations Issued
  - Supported reproductive health care privacy
  - Required update to HIPAA Notice of Privacy Practices (“NPP”) to address new privacy protections relating to substance use disorder patient records
- June 2025:
  - Federal court vacates reproductive health care rules
  - Federal court left intact the NPP rules
- Compliance Tips:
  - Review/update HIPAA policies and procedures
  - Update NPP by February 16, 2026



# Retirement Plans: Emerging Trends, Recent Litigation, and SECURE 2.0



# Retirement Plans and the News



- Alternative Assets in Defined Contribution Plans
  - Lawsuit against Intel for offering investments with holdings in private equity – dismissed
  - DOL rescinds guidance urging “extreme care” with respect to cryptocurrency investments
  - Empower offers managed account product with exposure to private markets; a move questioned by Senator Warren
  - Executive Order issued regarding review of alternative investments
- SEC Settlement with Empower
  - Empower agreed to pay millions for concealing conflicts of interests and making misleading statements associated with investment advice under its managed account program
- DOL Expands Correction Program
  - Effective March 17, 2025, late-deposited contributions, loan repayments, and certain loan failures can now be “self” corrected with the DOL
- “America First Investment Policy”
  - Current administration’s policy memo, and subsequent/related legislation, could impact “foreign adversary” investments

# Retirement Plan Litigation - Statistics

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT

## Excessive Fee and Performance Lawsuits by Year as of 12/31/2024



Source: Encore Fiduciary  
Excess Fee and  
Performance Case Tracking

- Over half the cases (34) filed in 2024 claimed excessive recordkeeping fees. Other common claims brought include:
  - Excessive Investment Fees – 11
  - Investment Imprudence – 16
  - Wrong Share Class – 12
  - **Forfeitures – 29**
- 2024 had the most excessive fee settlements (53 settlements), surpassing the previous record of 42 set in 2023.
- We continue to see more aggressive case theories challenging plan design, beyond fees or performance, being brought by plaintiffs.

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)



# Retirement Plan Litigation - Cases

Setting Sail with Certainty:  
**COMPLIANCE STRATEGIES**  
IN AN UNPREDICTABLE ENVIRONMENT



- Forfeitures (*Hutchins v. HP, Inc.*)
  - As with most forfeiture cases, plaintiffs claimed that using forfeitures to reduce employer contributions (rather than pay expenses) was a breach.
  - DOL amicus brief supported plan sponsors and argued that the funding of a plan, including decisions on timing and amount of contributions, is a *settlor* function.
  - Upcoming forfeiture relief deadline - Forfeitures accumulated in 2024, and in any prior year, are required to be used by December 31, 2025.
- Proxy Voting and ESG (*Spence v. American Airlines*)
  - A Texas court recently held that American Airlines breached its fiduciary duty of loyalty when BlackRock (a plan fund manager) pursued environmental, social, and governance (“ESG”) goals through proxy voting.
  - Documented prudence is particularly important when service providers, such as the investment managers in this case, align with the plan sponsor on a business or ideological perspective.
- Fiduciary Breach Claim Threshold (*Cunningham v. Cornell*)
  - In its highly publicized decision, the U.S. Supreme Court held that bare-bones allegations of ERISA-prohibited transactions and fiduciary breach claims may proceed to more expensive stages of litigation.
  - As fiduciary breach and prohibited transaction claims will be easier for plaintiffs to file, fiduciaries should identify prohibited transactions involving their plans and the related exemptions used (e.g., ensure service providers receive only reasonable and necessary fees).

Questions? Email [polls@kutakrock.com](mailto:polls@kutakrock.com)

# SECURE 2.0



- Amendment Deadline
  - Though operational effective dates for mandatory and optional provisions vary, the applicable amendment deadline for most plans is December 31, 2026.
  - Note that calendar-year, tax-exempt 457(b) plans must be amended by December 31, 2025.
- Roth Catch-Up Requirement
  - Effective January 1, 2026, all catch-up contributions made by certain participants must be Roth.
  - In September, the IRS issued final regulations addressing deemed elections and wage aggregation among related employers.
    - A plan sponsor's election regarding these two items must be in the plan document when it is amended ahead of the applicable deadline.
  - The deemed approach is recommended as participants are not required to take action (but must be allowed to opt out) and the IRS offers more favorable correction procedures.
- Paper Statement (DOL guidance pending)
  - Effective January 1, 2026, defined contribution plan participants must receive a paper account statement at least once annually. For defined benefit plans, once every three years.
  - N/A if the participant has affirmatively elected to receive notices electronically.



# Compliance Tips for Retirement Plan Fiduciaries



- Establish Procedures and Follow Them
  - Charter
  - Investment Policy Statement
    - Watch list
  - Fee Direction Memo
- Build and maintain a record to document prudent monitoring of investment performance/fees and service provider fees
  - Regularly confirm all investments are in the lowest-cost share class
- Regularly conduct RFPs for service providers

**Thank you for attending!**

**Please do not forget to complete the  
survey located at your table.**

**We appreciate your valuable feedback!**